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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 184

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JOHN J. WATTS

No. 185

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

HUGH C. SICARD

No. 186

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

PARKER SLOANE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1935

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 44061

JOHN J. WATTS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Docket entries*

Appearances: For petitioner, John F. McCabe, Esq., John J. Heberle, Esq., James P. Quigley, Esq.; for respondent, W. E. Davis, Esq., Paul Waring, Esq., Harold Allen, Esq.
Transferred to Mr. Van Fossan 7/21/33.

1929

May 4—Petition received and filed (4). Taxpayer notified. (Fee paid.)
" 6—Copy of petition served on General Counsel.
June 26—Answer and notice to produce filed by General Counsel.
" 28—Copy of answer served on taxpayer—assigned General Calendar.

1931

Nov. 19—Hearing set Feb. 2, 1932.

1932

Jan. 18—Motion to place on Reserve calendar filed by taxpayer. January 19, 1932, granted—continued to April 4, 1932.
" 28—Motion to consolidate with 47451 and 47973 filed by General Counsel. February 6, 1932, granted and continued to April 19, 1932.
2 Feb. 5—Reply to motion to consolidate filed by taxpayer.
Apr. 19—Hearing had before Van Fossan (9) on merits. Submitted. Briefs due in days.
May 30—Motion for extension to August 8, 1932, to file brief filed by taxpayer. May 31, 1932, granted.
June 10—Transcript of hearing April 19, 1932, filed.
July 30—Brief filed by taxpayer.
Aug. 1—Motion for extension of time to August 16, 1932, for brief filed by General Counsel. August 3, 1932, granted.
" 15—Motion for extension of time to September 1, 1932, for brief filed by General Counsel. August 16, 1932, granted.
" 30—Brief filed by General Counsel.

1933

Aug. 11—Findings of fact and opinion rendered—E. H. Van Fossan, Division 9. Decision will be entered under Rule 50.
" 21—Motion for review of Division Report with brief in support filed by taxpayer.
" 23—Order directing that proceedings be reviewed by the Board entered.

1933

Oct. 17—Order that report and determination be affirmed entered.
" 26—Notice of settlement filed by General Counsel.
" 28—Hearing set November 15, 1933, under Rule 50.
Nov. 15—Hearing had before Mr. E. H. Van Fossan, Division 9, on settlement—Rule 50. Amended recomputation of respondent to be filed in 30 days.
3 Nov. 18—Order that within 30 days a revised recomputation of tax be filed entered.
Dec. 18—Notice of settlement filed by General Counsel.
" 22—Hearing set January 10, 1934, under Rule 50.

1934

Jan. 9—Consent to settlement filed by taxpayer.
" 13—Decision entered—Ernest H. Van Fossan, Division 9.
Feb. 7—Petition for review by United States Circuit Court of Appeal, Second Circuit, with assignments of error filed by taxpayer.
" 7—Proof of service filed by taxpayer.
Mar. 29—Motion for extension to April 20, 1934, to complete record filed by taxpayer.
" 29—Order enlarging time to April 20, 1934, for preparation of evidence and transmission and delivery of record sur petition for review entered.
Apr. 18—Motion for extension to May 30, 1934, to complete record filed by taxpayer.
" 18—Order enlarging time to May 30, 1934, to prepare evidence and transmit record sur petition for review entered.
May 18—Agreed statement of evidence lodged.
" 18—Agreed praecipe filed.
" 21—Agreed statement of evidence approved and ordered filed.
" 30—Order enlarging time to July 14, 1934, for transmission and delivery of record entered.

4 Before U. S. Board of Tax Appeals.

Docket No. 47451

HUGH C. SICARD, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Docket entries*

Appearances: For petitioner, James P. Quigley, Esq., John F. McCabe, Esq., John J. Heberle, Esq., Robert J. Heberle, Esq.; For respondent, W. E. Davis, Esq., Paul Waring, Esq., Harold Allen, Esq.

Transferred to Mr. Van Fossan 7/21/33.

1930

Feb. 11—Petition received and filed. Taxpayer notified. (Fee paid.)

" 12—Copy of petition served on General Counsel.

Mar. 31—Answer filed by General Counsel.

Apr. 2—Copy of answer served on taxpayer—General Calendar.

1931

Jan. 18—Notice of appearance of James P. Quigley as counsel for taxpayer, filed.

1932

Jan. 20—Hearing set April 4, 1932.

" 28—Motion to consolidate with 44061 and 47973 for hearing filed by General Counsel. February 6, 1932, granted and continued to April 19, 1932.

5 Feb. 5—Reply to motion to consolidate filed by taxpayer. See 44061.

Apr. 19—Hearing had before Mr. Van Fossan on merits. Submitted. Briefs due in 60 days.

May 30—Motion for extension to August 1, 1932, to file brief filed by taxpayer. May 31, 1932, granted.

June 10—Transcript of hearing April 19, 1932, filed.

July 29—Brief filed by taxpayer.

Aug. 1—Motion for extension of time to August 16, 1932, for brief filed by General Counsel. August 3, 1932, granted.

" 15—Motion for extension of time to September 1, 1932, for brief filed by General Counsel. August 16, 1932, granted.

" 30—Brief filed by General Counsel.

1933

Aug. 11—Findings of fact and opinion rendered—Ernest H. Van Fossan, Division 9. Decision will be entered under Rule 50.

" 21—Motion for review of Division Report with brief in support filed by taxpayer.

" 23—Order that report of Division 9 dated July 26, 1933, and promulgated August 11, 1934, be reviewed by the Board entered.

Oct. 17—Order that report and determination be affirmed entered.

" 26—Notice of settlement filed by General Counsel.

" 28—Hearing set November 15, 1933, on settlement.

6 Nov. 15—Hearing had before Mr. Van Fossan on settlement under Rule 50. Amended recomputation to be filed by respondent in 30 days.

" 20—Order that within 30 days a revised or complete recomputation of tax be filed entered.

Dec. 18—Notice of settlement filed by General Counsel.

" 21—Hearing set January 10, 1934, on settlement.

1934
Jan. 8—Consent to settlement filed by taxpayer.
" 15—Decision entered—Ernest H. Van Fossan, Division 9.
" 29—Notice of the appearance of Robert J. Heberle as associate counsel for taxpayer filed.
Feb. 7—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
" 7—Proof of service filed by taxpayer.
Mar. 29—Motion for extension to April 20, 1934, to complete record filed by taxpayer.
" 29—Order enlarging time to April 20, 1934, for preparation of evidence and delivery of record entered.
Apr. 18—Motion for extension to May 30, 1934, to complete record filed by taxpayer.
" 18—Order enlarging time to May 30, 1934, to complete record entered.
May 18—Agreed statement of evidence lodged.
" 18—Agreed praecipe filed.
7 May 21—Agreed statement of evidence approved and ordered filed.
" 30—Order enlarging time to July 14, 1934, for transmission and delivery of record entered.

Before U. S. Board of Tax Appeals

Docket No. 47973

PARKER SLOANE, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Docket entries*

Appearances: For petitioner, James P. Quigley, Esq., John F. McCabe, Esq., John J. Heberle, Esq., Robert J. Heberle, Esq; for respondent, W. E. Davis, Esq., Paul Waring, Esq., Harold Allen, Esq.

Transferred to Mr. Van Fossan 7/21/33.

1930
Mar. 25—Petition received and filed. Taxpayer notified. (Fee paid.)
" 26—Copy of petition served on General Counsel.
Apr. 25—Answer filed by General Counsel.
" 28—Copy of answer served on taxpayer—General Calendar.

8 1932
Jan. 18—Notice of appearance of James P. Quigley as counsel for taxpayer filed.
" 20—Hearing set April 4, 1932.
" 28—Motion to consolidate with 44061 and 47451 for hearing filed by General Counsel.
Feb. 5—Reply to motion to consolidate filed by taxpayer.
" 6—Motion to consolidate granted and continued to April 19, 1932.
Apr. 19—Hearing had before Mr. Van Fossan on merits. Submitted. Briefs due in 60 days.
May 30—Motion for extension to August 1, 1932, to file brief filed by taxpayer. May 31, 1932, granted.
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Aug. 1—Motion for extension of time to August 16, 1932, for brief field by General Counsel. August 3, 1932, granted.
" 15—Motion for extension of time to September 1, 1934, for brief filed by General Counsel. August 16, 1932, granted.
" 30—Brief filed by General Counsel.
1933
Aug. 11—Findings of fact and opinion rendered—Ernest H. Van Fossan, Division 9. Decision will be entered under Rule 50.
" 21—Motion for review of Division Report with brief in support filed by taxpayer.
9 Aug. 23—Order that report of Division 9, dated July 26, 1933, and promulgated August 11, 1933, be reviewed by the Board entered.
Oct. 17—Order that report and determination be affirmed entered.
" 26—Notice of settlement filed by General Counsel.
" 28—Hearing set November 15, 1933, on settlement.
Nov. 15—Hearing had before Mr. Van Fossan on settlement—30 days for Commissioner to file amended recomputation.
" 17—Order allowing 30 days to file revised or complete recomputation entered.
Dec. 18—Notice of settlement filed by General Counsel.
" 21—Hearing set January 10, 1934, on settlement.
1934
Jan. 8—Consent to settlement filed by taxpayer.
" 15—Decision entered—Ernest H. Van Fossan, Division 9.
" 29—Notice of the appearance of Robert J. Heberle as associate counsel for taxpayer filed.
Feb. 7—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
" 7—Proof of service filed by taxpayer.

1934

Mar. 29—Motion for extension to April 20, 1934, to complete record filed by taxpayer.

Mar. 29—Order enlarging time to April 20, 1934, for preparation of evidence and delivery of record entered.

Apr. 18—Motion for extension to May 30, 1934, to complete record filed by taxpayer.

" 18—Order enlarging time to May 30, 1934, to complete record entered.

May 18—Agreed statement of evidence lodged.

" 18—Agreed praecipe filed.

" 21—Agreed statement of evidence approved and ordered filed.

" 30—Order enlarging time to July 14, 1934, for transmission and delivery of record entered.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted.]

*Petition, No. 44061*

Filed May 4, 1929

The above-named petitioner hereby appeals from a determination of the Commissioner of Internal Revenue, hereinafter more fully referred to, and as a basis for his petition alleges:

11 1. Your petitioner is an individual, residing at 131 Riverside Drive, New York, N. Y.

2. Your petitioner takes this appeal from a determination of the Commissioner of Internal Revenue finding a deficiency in the amount of income taxes payable by him as set forth in a letter from the Commissioner hereinafter more fully referred to.

3. On or about March 18, 1929, the Commissioner of Internal Revenue sent to your petitioner by Registered Mail a letter dated on that day and signed, " D. H. Blair, Commissioner, by C. B. Allen, Deputy Commissioner ", addressed to your petitioner at 131 Riverside Drive, New York City. The said letter advised your petitioner that the determination of his income tax liability for the year 192 disclosed a deficiency in the tax, amounting to $63,441.83, as shown in a statement attached to said letter. A copy of said letter and its accompanying Statement is annexed hereto marked "Exhibit A."

4. The tax in which the Commissioner of Internal Revenue has found the deficiency referred to herein, is the income tax imposed upon the net income of your petitioner for the taxable year 1924 and the amount of the deficiency in controversy is the entire amount of said deficiency, namely, $63,441.83.

5. The following is a statement of the assignments of error committed by the Commissioner of Internal Revenue in determining the amount of your petitioner's liability for the year 1924:

12 (a) The Commissioner of Internal Revenue erred in setting up capital gain of $507,534.65 in respect to the so-called

"sale" of stock of the United States Ferro Alloys Corporation to the Vanadium Corporation of America.

(b) The Commissioner of Internal Revenue erred in treating the transaction as a purchase of stock by the Vanadium Corporation whereas, in fact, the transaction was an exchange for stock and securities of the Vanadium Corporation under the reorganization provisions of the Revenue Act.

(c) The Commissioner of Internal Revenue erred in assuming that the amount of $338,815.50 (referred to on Page 3 of the Statement) "constituted constructive receipt to the owners of the stock disposed of", and, therefore, represented part of the purchase price to the Vanadium Corporation.

6. The facts upon which your petitioner relies are as follows:

(a) Under an agreement dated December 23, 1924, all of the stockholders of the United States Ferro Alloys Corporation, acting through a common agent, made an agreement with the Vanadium Corporation of America under the terms of which *all* of the outstanding 30,000 common shares of the United States Ferro Alloys Corporation were exchanged for the following:

13 1. Bonds of the United States Ferro Alloys Corporation in the principal amount of $1,161,184.50. The said bonds being guaranteed by Vanadium Corporation of America.

2. Common stock of the Vanadium Corporation of America amounting to 33,333⅓ shares.

Under the agreement, 33.333⅓ shares were required to be deposited "in escrow" with the Guaranty Trust Company of New York City, the "escrow" deposit to be dissolved on January 1, 1926, and the precise amount thereof then due to the exstockholders of "Ferro Alloys" to be then determined on basis of the earning power demonstrated by the "Ferro Alloys" Corporation during the year of 1925. The amount of "Vanadium" Stock so determined to be due to the exstockholders of "Ferro Alloys" Corporation on dissolution of said "escrow", was 32,103 shares.

(b) Concurrently, and under the terms of the agreement, the Vanadium Corporation of America agreed to pay past due obligations of Ferro Alloys in the amount of $338,815.50.

14 The two creditors which Vanadium Corporation of America agreed to pay were—

| | |
|---|---|
| Louise M. Higham | $298,815.50 |
| Niagara Power Company | 40,000.00 |
| | 338,815.50 |

Neither this Taxpayer nor any other stockholder of the "Ferro Alloys" Corporation had any personal interest whatever in either of the said obligations or in the said creditors of the "Ferro Alloys" Corporation, but none the less the stockholders of "Ferro Alloys" had made the immediate payment of those particular liabilities of the "Ferro Alloys" Corporation, one of the major conditions under which they agreed to deliver to "Vanadium" their "Ferro Alloys"

Stock, and thereby dispossess themselves of control of the "Ferro Alloys" Corporation.

The concern of the departing stockholders in respect of having these particular (and no other) liabilities of the "Ferro Alloys" Corporation paid immediately following their relinquishment of said control, accrued from the fact that those liabilities were procured through and secured by "moral" guaranties resident in the "Ferro Alloys" Corporation's personnel, and it was determined that these particular obligations must be paid during the tenure of that personnel and not be left, as were all other liabilities, to payment in the discretion or at the convenience of the new personnel that would become their successors in the management of the "Ferro Alloys" Corporation on conclusion of the stock-exchange transaction.

The simple facts are that by imposing upon "Vanadium" the obligation to immediately pay off those creditors of "Ferro Alloys" as a condition precedent to the exchange of Stock, the stockholders of "Ferro Alloys" compelled "Vanadium" to become a creditor of the "Ferro Alloys" Corporation to the extent of $338,815.50, in place of those two creditors whom it was required to pay off and supersede. It was merely a substitution of creditors and as such it, of course, could not result in profit or loss for any participant.

(c) This Taxpayer did not, directly or indirectly, receive any part of the $338,815.50 above referred to.

(d) The Taxpayer claims that he became a participant in a "reorganization" within the meaning of the Revenue Act of 1924 and the regulations pertaining thereto, and that the transaction resulted in an exchange of his stock for Bonds issued under the reorganization agreement and guaranteed by the Vanadium Corporation, and stock of the said Vanadium Corporation.

(e) Because the Taxpayer did not receive either money or other property additional to the stock and bonds received in exchange for his stock, this Taxpayer did not incur any tax liability in 1924 in respect of the said transaction.

(f) In his tax returns of subsequent years, the Taxpayer has reported the gain arising from the sale of this stock as and when the stock has been sold by him. This method, the Taxpayer claims is in accordance with the Revenue Act and the regulations pertaining thereto.

Wherefore your petitioner prays that this Board may hear the proceedings and

1. That the determination of the Commissioner be held to have been erroneous.

2. That the entire proposed assessment be disallowed.

JOHN F. MCCABE,
*Counsel for Petitioner,*
*Post Office Address, No. 41 Maiden Lane, New York, N. Y.*

17 *Exhibit "A" to petition*

TREASURY DEPARTMENT,
*Washington, March 13, 1929.*

Mr. JOHN J. WATTS,
*131 Riverside Drive, New York, New York.*

SIR: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1924 discloses a deficiency of $63,441.83, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates
18 thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas, if No Agreement is Filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. BLAIR,
*Commissioner.*
By: C. B. ALLEN,
*Deputy Commissioner.*

Inclosures:
Statement.
Form 866.
Form 882.

Exhibit "A-1"

Statement

IT:AR:B-12.
RMT-60D.

MARCH 13, 1929.

In re: Mr. John J. Watts, 131 Riverside Drive, New York, New York.

*Tax liability*

| | |
|---|---|
| Year 1924: | |
| Corrected tax liability | $66,054.46 |
| Tax previously assessed | 2,612.63 |
| Deficiency | $63,441.83 |

A review of your income-tax return for the year 1924 discloses a deficiency in tax.

| 19 | 1924 | |
|---|---|---|
| Ordinary net income as corrected in revenue agent's report | | $44,951.51 |
| Add: | | |
| 1. Capital net gain | $507,534.65 | |
| Capital net loss shown on return | 10,000.00 | |
| | | 497,534.65 |
| Corrected total net income | | $542,486.16 |
| Less: | | |
| Capital net gain | $507,534.65 | |
| Capital net loss shown on return | 10,000.00 | |
| | | 497,534.65 |
| Income subject to surtax | | $44,951.51 |
| Less: | | |
| Dividends | $18,878.25 | |
| Personal Exemption | 2,900.00 | |
| | | 21,778.25 |
| Balance subject to normal tax | | $23,173.26 |
| Normal tax at 2% on $4,000.00 | | $80.00 |
| Normal tax at 4% on $4,000.00 | | 160.00 |
| Normal tax at 6% on $15,173.26 | | 910.40 |
| Surtax on $44,951.51 | | 2,722.73 |
| Tax at 12½% on capital net gain of $497,534.65 | | 62,191.83 |
| Total tax | | $66,064.96 |
| Less: | | |
| Earned income credit | | 10.50 |
| Total tax assessable | | $66,054.46 |
| Tax previously assessed | | 2,612.63 |
| Deficiency in tax | | $63,441.83 |

20 Explanation of Changes

1. Information on file in this office indicates that you realized a capital net gain of $507,534.65 from the sale of stock of the United States Ferro Alloys Corporation to the Vanadium Corporation of America.

A computation of the method of arriving at the amount of such profit follows:

| | | |
|---|---|---|
| Received for total stock of United States Ferro Alloys Corporation | | $2,500,000.00 |
| 1. Amount paid creditors of United States Ferro Alloys Corporation | $338,815.50 | |
| 2. Additional cost allowed | 43,363.08 | |
| 3. Value of undelivered stock | 36,910.00 | |
| | | 419,088.58 |
| Net sale price | | $2,080,911.42 |
| ⅓ interest | | $693,637.14 |
| Cost of stock | | 186,102.49 |
| Capital net gain | | $507,534.65 |

It appears that, under the terms of the contract involving this transaction, the purchase price of the stock to the Vanadium Corporation was $2,500,000.00 made up as follows:

| | |
|---|---|
| 33,333⅓ shares of Vanadium Corporation stock at $30.00 a share | $1,000,000.00 |
| Bonds taken as part payment | 1,161,184.50 |
| Payment to Louise M. Higham | 298,815.50 |
| Payment to Niagara Power Company | 40,000.00 |
| | $2,500,000.00 |

21 From information on file in this office, the amounts of $43,363.08 and $36,910.00, representing liability for taxes against the year 1924 and the value of stock not delivered under the agreement between the United States Ferro Alloys Corporation and the Vanadium Corporation, respectively, have been allowed as deductions against profit which would have been realized under the terms of the original sales agreement.

In computing the capital net gain as shown above, you are advised that this office holds that the amount of $338,815.50 paid by the Vanadium Corporation to the creditors of the United States Ferro Alloys Corporation constituted constructive receipt to the owners of the stock disposed of and, therefore, represents part of the purchase price to the Vanadium Corporation.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1924, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination, as provided by Section 274(a) of the Revenue Act of 1926. It is, therefore, necessary at this time, in order to protect the interests of the Government, to issue this formal notice of deficiency.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

22 [*Duly sworn to by John J. Watts, jurat omitted in printing.*]

Before United States Board of Tax Appeals

[Title omitted.]

*Answer, No. 44061*

Filed June 26, 1929

The Commissioner of Internal Revenue, by his attorney,
23 C. M. CHAREST, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Admits the allegations of Paragraph 3.
4. Admits the allegations of Paragraph 4.
5. (a) Denies the error complained of in Paragraph 5 (a).
   (b) Denies the error complained of in Paragraph 5 (b).
   (c) Denies the error complained of in Paragraph 5 (c).

6. (a) As to Paragraph 6 (a), the Commissioner admits the matter set forth therein insofar as the same is supported by the terms of a written agreement dated December 23, 1924, and denies the remainder of said paragraph. (Notice is hereby served upon petitioner to produce the original of said agreement before the Board of Tax Appeals at the hearing in this proceeding.)

(b) Denies the matter set forth in Paragraph 6 (b).

(c) Denies the matter set forth in Paragraph 6 (c).

(d) Denies the matter set forth in Paragraph 6 (d).

6. (e) As to Paragraph 6 (e), the Commissioner admits taxpayer received stocks and bonds as part consideration for his stock and denies the remainder of said paragraph.

(f) Denies the matter set forth in Paragraph 6 (f).

24 Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's petition be denied.

(Signed) C. M. CHAREST,
C. M. CHAREST,
*General Counsel, Bureau of Internal Revenue.*

Of Counsel:
JOHN E. MARSHALL,
*Special Attorney, Bureau of Internal Revenue.*
JEM CAR/csf

Before United States Board of Tax Appeals

[Title omitted.]

*Petition No. 47451*

Filed Feb. 11, 1930

The above-named petitioner hereby appeals for a re-determination of the deficiency set forth by the Commissioner of Internal
25 Revenue in his notice of deficiency (IT:AR:R-12—RMT-60D) dated December 14, 1929, and as a basis of these proceedings, alleges as follows:

1. The petitioner is an individual, a resident of New York City, having offices at 100 East 42nd Street, New York City.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed (dated) to the petitioner on December 14, 1929.

3. The taxes in controversy are income taxes for the calendar year 1924 in the amount of $63,441.83.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

4-a. The Commissioner has determined that Petitioner realized taxable income through sale in 1924 of 10,000 shares of the common stock of United States Ferro Alloys Corporation:

4–b. The Commissioner has determined that Petitioner realized taxable income in the amount of $507,534.65 through the sale that is alleged as stated in par. 4–a.

4–c. The Commissioner has determined a deficiency of $63,441.83 in respect of said alleged income of $507,534.65 on the theory that Petitioner is subject to tax on the last-stated amount in addition to the net income of $34,362.14 that was reported in Petitioner's 1924 return, and on which income the required tax was fully paid.

26

4–d. The Commissioner's determination is based upon information contained in a certain Revenue Agent's Report considered in connection with a certain protest filed by the Taxpayer dated December 20, 1928, and which it appears was dated not December 20, 1928, but December 19, 1928.

5. The facts upon which the Petitioner relies as the basis of this proceeding, are as follows:

5–a. That prior to December 1924 Petitioner was the owner of 10,000 shares of the common stock of United States Ferro Alloys Corporation;

5–b. That on or about December 1, 1924, an agreement was made between all of the common-stockholders of said Ferro Alloys Corporation, acting through a common agent, and the Vanadium Corporation of America, under which the former transferred to the latter all of the outstanding common stock of said Ferro Alloys Corporation, being 30,000 shares of the par value of $100 per share.

5–c. That said agreement provided as a prerequisite to said transfer that said Vanadium Corporation should pay certain indebtedness of said Ferry Alloys Corporation, and this was accomplished by Vanadium Corporation making the required payments to creditors of Ferro Alloys Corporation and by that act becoming a creditor of that corporation in their stead.

27

5–d. That said creditors were not stockholders of either corporation.

5–e. That the consideration received from Vanadium Corporation in exchange for said 30,000 shares of common stock of Ferro Alloys Corporation consisted of Bonds of the latter thereupon issued and guaranteed by the former, plus some specified but undetermined part of 33,333⅓ shares of the no par common stock of Vanadium Corporation, of which 23,333⅓ shares were delivered, and 10,000 shares were placed in escrow with the Guaranty Trust Company of New York City until January 1, 1926, when it was determined that the total shares due to Ferro Alloys Corporation's former stockholders was 32,103 shares.

5–f. That under the agreement mentioned in par. 5–b., the retiring stockholders of said Ferro Alloys Corporation were required to pay certain liabilities thereafter determined in respect of said corporation, and these were ascertained and paid in 1925, the amount then paid by this Petitioner being $16,563.02.

6. Wherefore, the Petitioner prays that this Board may hear the proceeding and find that

6-a. The said exchange of stock for stock and bonds in 1924 was a tax-free exchange under the provisions of Sec. 203 (b) (2) of the Act of 1924.

(s) HUGH C. SICARD,
HUGH C. SICARD,
*100 East 42nd Street, New York City, N. Y.*

[*Duly sworn to by Hugh C. Sicard, jurat omitted in printing.*]

*Exhibit "A" to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
*Washington, Dec. 14, 1929.*

Address Reply to Commissioner of Internal Revenue and Refer to—
Mr. HUGH C. SICARD,
*100 East 42nd Street, New York, New York.*

SIR: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1924 discloses a deficiency of $63,441.83, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas if No Agreement is Filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBERT H. LUCAS,
*Commissioner,*
By DAVID BURNET,
*Deputy Commissioner.*

Inclosures:
Statement.
Form 866.
Form 882.

Statement

IT:AR:B–12. DEC. 14, 1929.
RMT–60D.

In re: Mr. Hugh C. Sicard, 100 East 42nd Street, New York, New York.

*Tax liability*

Year, 1924:
Corrected tax liability, $66,457.38
Tax previously assessed, $3,015.55
Deficiency, $63,441.83
Overassessment, None.

A review of the reports of the Internal Revenue Agent in
31 Charge at New York, New York, covering your tax liability for the years 1924, 1925, 1926, and 1927, discloses the same to be correct with the exception that profit shown in the report on the sale of stock in 1924 has been decreased by $12,793.51 as the result of information submitted in your protest of December 20, 1928, which has received careful consideration in arriving at the amount of deficiency for 1924.

A computation of your corrected profit on the sale in question follows:

| | | |
|---|---|---|
| Sale price of stock | | $2,500,000.00 |
| Cost of sales shown | $338,815.50 | |
| Additional cost allowed as per protest | 43,363.08 | |
| Value of undelivered stock | 36,910.00 | |
| | | 419,088.58 |
| Net sale price | | $2,080,911.42 |
| ⅓ interest of $2,080,911.42 | | $693,637.14 |
| Cost of ⅓ interest | | 186,102.49 |
| Profit to be reported | | $507,534.65 |

1924

| | | |
|---|---|---|
| Net income as shown on return | | $34,362.12 |
| Add: | | |
| 1. Profit on sale of stock | | 507,534.65 |
| Corrected net income | | 541,896.77 |
| Less: | | |
| Capital net gain | | 507,534.65 |
| Income subject to surtax | | $34,362.12 |
| 32 Less: | | |
| Dividends | $516.75 | |
| Personal exemption | 1,000.00 | |
| | | 1,516.75 |
| Balance subject to normal tax | | $32,845.37 |
| Normal tax at 2 percent on $4,000.00 | | $80.00 |
| Normal tax at 4 percent on $4,000.00 | | 160.00 |
| Normal tax at 6 percent on $24,845.37 | | 1,490.72 |
| Surtax on $34,362.12 | | 1,350.83 |
| Tax at 12½ percent on $507,534.65 | | 63,441.83 |
| Total Tax | | $66,532.38 |
| Less: | | |
| Earned income credit | | 75.00 |
| Total tax assessable | | $66,457.38 |
| Tax previously assessed | | 3,015.55 |
| Deficiency in tax | | $63,441.83 |

Explanation of Change

It is held by the Bureau that the transaction involving the capital net gain of $507,534.65 was within the provisions of Article 1573 of Regulations 65 and, accordingly, this amount has been included as taxable income to you for the year 1924.

In connection with the years 1925, 1926, and 1927, each of which indicates an overassessment as a result of the above adjustment in 1924, you are informed that you will be advised in a subsequent communication as to the result of the audit of your returns for these years.

33 Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Inasmuch as you did not avail yourself of the privilege of requesting an extension of the statutory period for assessment by the filing of a consent, as provided for under Section 278 (c) of the Revenue Act of 1926, and of which provision you were advised under date of November 1, 1929, it is necessary at this time, in order to protect the interests of the Government, to issue this formal notice of deficiency.

A consent is on file in this office extending the statutory period of limitations for making assessment against the year 1924 to December 31, 1929.

(272M.)

NOTICE

Appeals should be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., in accordance with the rules of practice established by the Board

The United States Board of Tax Appeals is in no way connected with the Bureau of Internal Revenue or the Treasury Department. Under no circumstances should a petition on appeal be forwarded to the Commissioner or the Collector of Internal Revenue. If you decide to initiate a proceeding before the Board, your petition

34 proceedings, and proofs in the proceedings must be in accordance with the rules of practice of the Board, with Section 900 of the Revenue Act of 1924 and Section 1000 of the Revenue Act of 1926. Under the statute and the rulings of the Board a petition (together with a filing fee of $10.00) must be received and filed with the Board within sixty days from the date of mailing of the attached notice (not counting Sunday as the sixtieth day).

NOTICE

Interest at the rate of 6 per centum per annum computed as follows is due on all deficiencies in tax and will be included in notice and demand for payment.

For the years 1909 to 1920, inclusive, from February 26, 1926 (date of passage of the 1926 Act), to the date of assessment, or, in case of a waiver under Section 274(d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For the years 1921 to 1924, inclusive, from the date prescribed for payment (or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment) to the date of assessment, or, in case of a waiver under Section 274(d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For 1925 and subsequent years, from the date prescribed for the payment of the first installment to the date the deficiency is
35 assessed, or, in case of a waiver under Sections 274(d) of the 1926 Act or 272(d) of the 1928 Act, to the thirtieth day after the filing of such waiver, whichever is the earlier.

The inclosed agreement when signed by you will constitute a waiver and will, if filed promptly, operate to curtail the amount of interest you will be obliged to pay since the interest period will terminate thirty days after filing, while without the waiver, assessment must be delayed sixty days from date of deficiency letter.

Agreement as to final determination of tax liability

This agreement, made in duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between Mr. Hugh C. Sicard, a taxpayer located at 100 East 42nd Street, New York, N. Y., and the Commissioner of Internal Revenue;

Whereas, there has been a determination of the tax liability of said taxpayer in respect of Federal Income Tax for the calendar year 1924 in the principal sum of Sixty Six Thousand Four Hundred Fifty Seven Dollars and Thirty Eight Cents ($66,457.38), exclusive of any penalty or interest properly applicable thereto as provided by law;

Now, this agreement witnesseth, that said taxpayer and said Commissioner of Internal Revenue hereby mutually agree that the
36 principal amount of such liability so determined shall be final and conclusive if this agreement is approved by the Secretary of the Treasury, or the Undersecretary, within six months from the date this agreement is signed by the taxpayer.

In witness whereof, the above parties have subscribed their names to these presents in duplicate.

Signed this ------ day of ----------, 19--

---

*Taxpayer.*

By ---

---

[If the taxpayer is a corporation affix its seal here.]

The above agreement has been approved by the Secretary of the Treasury, or the Undersecretary, in accordance with the provisions of Section 606 of the Revenue Act of 1928, the approval being specifically enumerated on—

Schedule No. ------
Dated----------
Signed ----------, 19--
(Date)

---

*Commissioner of Internal Revenue.*

By ---

37 Waiver of Restrictions on Assessment and Collection of Deficiency

Irrespective of the execution or approval of the foregoing instrument, the undersigned taxpayer hereby waives the restrictions provided in Section 274 (a) or 308 (a) of the Revenue Act of 1926 or Section 272 (a) of the Revenue Act of 1928 on the assessment and collection of any deficiency in tax included in the principal sum of the tax liability as set forth in the said instrument, together with any penalty or interest properly applicable thereto as provided by law.

[If the taxpayer is a corporation affix its seal here.]

---,

*Taxpayer.*

By ---,

---

(See instructions on reverse side)

To be accomplished in duplicate and both copies returned.

38 Before United States Board of Tax Appeals

[Title omitted.]

*Answer, No. 47451*

Filed Mar. 31, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Admits the allegations of Paragraph 3.
4-a. Denies the error complained of in Paragraph 4-a.
4-b. Denies the error complained of in Paragraph 4-b.
4-c. Denies the error complained of in Paragraph 4-c.
4-d. Denies the error complained of in Paragraph 4-d.

39 5-a to 5-f, inclusive. Denies each and every allegation contained in Paragraphs 5-a to 5-f, inclusive, which is inconsistent with or contrary to the determination of the Commissioner as set forth in deficiency letter, a copy of which is attached to the petition.

Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

(Signed) C. M. CHAREST,
C. M. CHAREST,
*General Counsel, Bureau of Internal Revenue.*

Of Counsel:
JOHN E. MARSHALL,
*Special Attorney, Bureau of Internal Revenue.*

40 Before United States Board of Tax Appeals

[Title omitted.]

*Petition, No. 47973*

Filed Mar. 25, 1930

The above-named petitioner hereby appeals for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-12—RMT-60D) dated March 17, 1930, and as a basis of these proceedings, alleges as follows:

1. The petitioner is an individual, a resident of New York City, having offices at 100 East 42nd Street, New York City.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed (dated) to the petitioner on March 17, 1930.

3. The taxes in controversy are income taxes for the calendar year 1924 in the amount of Sixty-three thousand, Four hundred forty-one dollars and Eighty-three cents ($63,441.83).

41 4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

4-a. The Commissioner has determined that Petitioner realized taxable income through an exchange which he alleges was a sale in 1924 of 10,000 shares of the Common Stock of United States Ferro Alloys Corporation.

4-b. The Commissioner has determined that Petitioner realized taxable income in the amount of $507,534.65 through the sale he alleges as stated in Par. 4-a.

4-c. The Commissioner has determined a deficiency of $63,441.83 in respect of said alleged income of $507,534.65 on the theory that Petitioner is subject to tax on the last-stated amount in addition to the net income of $29,273.50 and $12,509.37, respectively, that was reported in Petitioner's 1924 Return, and on which income the required tax was fully paid.

5. The facts upon which the Petitioner relies as the basis of this proceeding, are as follows:

5-a. That prior to December, 1924, Petitioner was the owner of 10,000 shares of the Common Stock of United States Ferro Alloys Corporation.

42 5-b. That on or about December 1, 1924, an agreement was made between all of the Common-stockholders of said Ferro Alloys Corporation, acting through a common agent, and the Vanadium Corporation of America, in which the former agreed to transfer, and pursuant to which they eventually did transfer to the latter, all of the outstanding Common Stock of said Ferro Alloys Corporation, being 30,000 shares of the par value of $100 per share.

5-c. That said agreement provided as a prerequisite to said transfer that said Vanadium Corporation should pay certain indebtedness of said Ferro Alloys Corporation, and this prerequisite to the transfer was accomplished by Vanadium Corporation making the required payments to creditors of Ferro Alloys Corporation and by that act becoming a creditor of that corporation in their stead.

5-d. That said creditors were not stockholders of either corporation.

5-e. That the consideration received from Vanadium Corporation in exchange for said 30,000 shares of Common Stock of said Ferro Alloys Corporation consisted of Bonds of the latter thereupon issued and guaranteed by the former, plus some specified but then undetermined part of 33,333⅓ shares of the No Par Common Stock of Vanadium Corporation, of which 23,333⅓ shares were delivered, and 10,000 shares were placed in escrow with the Guaranty Trust

43 Company of New York City until January 1, 1926, when it was determined that the total shares due to Ferro Alloys Corporation's former stockholders was 32,103 shares which were thereupon distributed and the balance returned to said Vanadium Corporation.

5-f. That under the agreement mentioned in Par. 5-b, the retiring stockholders of said Ferro Alloys Corporation were required to pay, certain liabilities not then but thereafter determined in respect of said corporation, and these were ascertained and paid in 1925, the amount then paid by this Petitioner being $16,563.02.

6. Wherefore, the Petitioner prays that this Board may hear the proceeding and find that

6-a. The said exchange of Stock for Stock and Bonds in 1924 was a tax-free exchange under the provisions of Sec. 203 (b) (2) of the Act of 1924, and that there is no deficiency for 1924.

PARKER SLOANE,
*100 East 42nd Street, New York City.*

[*Duly sworn to by Parker Sloane, jurat omitted in printing.*]

44 *Exhibit "A" to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
*Washington, Mar. 17, 1930.*

Address reply to Commissioner of Internal Revenue and refer to—

Mr. PARKER SLOANE,
*8 East 62nd Street, New York, New York.*

SIR: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year(s) 1924 and 1925 discloses a deficiency of $63,441.83 for
45 the year 1924 and an overassessment of $33,860.05 for the year 1925 as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability for the year(s) in which a deficiency is disclosed.

However, if you do not desire to petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is

made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
*Commissioner.*
By DAVID BURNET,
*Deputy Commissioner.*

Inclosures:
Statement.
Form 866.
Form 882.

46 Statement

IT:AR:B–12.
RMT–60D. MAR. 17, 1930.

In re: Mr. Parker Sloane, 8 East 62nd Street, New York, New York.

*Tax liability*

| Year | Corrected tax liability | Tax previously assessed | Deficiency | Over assessment |
|---|---|---|---|---|
| 1924 | $65,966.60 | $2,524.77 | $63,441.83 | |
| 1925 | 2,537.19 | 35,397.24 | | $33,860.05 |
| Totals | 68,503.79 | 38,922.01 | 63,441.83 | 33,860.05 |
| Add amount barred by statute, 1925 | 33,860.05 | None | None | 33,860.05 |
| Total tax liability | 102,363.84 | 38,922.01 | 63,441.83 | None |

A review of your income-tax returns for the years 1924 and 1925 discloses a deficiency in tax for 1924 of $63,441.83 and an overassessment for 1925 of $33,860.05.

1924

| | | |
|---|---|---|
| Ordinary net income originally reported | | $29,273.50 |
| Capital net gain originally reported | $12,509.37 | |
| Add: 1. Increase in capital net gain | 507,534.65 | |
| | | 520,044.02 |
| Corrected total net income | | $549,317.52 |
| 47 Less: Capital net gain | | 520,044.02 |
| Income subject to surtax | | $29,273.50 |
| Less: Dividends | $22,841.50 | |
| Personal exemption | 1,000.00 | |
| | | 23,841.50 |
| Balance subject to normal tax | | $5,432.00 |
| Normal tax at 2% on $4,000.00 | | $80.00 |
| Normal tax at 4% on $1,432.00 | | 57.28 |
| Surtax on $29,273.50 | | 854.62 |
| Tax at 12½% on capital net gain of $520,044.02 | | 65,005.50 |
| Total tax | | $65,997.40 |

| | | |
|---|---|---|
| Less: | | |
| Earned income credit | $20.00 | |
| Tax paid at source | 10.80 | |
| | | $30.80 |
| Total tax assessable | | $65,906.60 |
| Tax previously assessed | | 2,524.77 |
| Deficiency in tax | | $63,441.83 |

## Explanation of Changes

1. Information on file in this office indicates that you realized a capital net gain of $507,534.65 from the sale involving the stock of the United States Ferro Alloys Corporation and the Vanadium Corporation of America.

A computation of the method of arriving at the amount of such profit follows:

| | | | |
|---|---|---|---|
| 48 | Received for total stock of United States Ferro Alloys Corporation | | $2,500,000.00 |
| Add: | | | |
| | 1. Amount paid creditors of United States Ferro Alloys Corporation | $338,815.50 | |
| | 2. Additional cost allowed | 43,363.08 | |
| | 3. Value of undelivered stock | 36,910.00 | |
| | | | 419,088.58 |
| | Net sale price | | $2,080,911.42 |
| | ⅓ interest | | $693,637.14 |
| | Cost of stock | | 186,102.49 |
| | Capital net gain | | $507,534.65 |

It appears that under the terms of the contract involving this transaction the purchase price of the stock to the Vanadium Corporation was $2,500,000.00 made up as follows:

| | |
|---|---|
| 33,333⅓ shares of Vanadium Corporation stock at $30.00 per share | $1,000,000.00 |
| Bonds taken as part payment | 1,161,184.50 |
| Payment to Louise M. Higham | 298,815.50 |
| Payment to Niagara Power Company | 40,000.00 |
| | $2,500,000.00 |

From information on file in this office the amounts of $43,363.08 and $36,910.00, representing liability for taxes against the year 1924 and the value of stock not delivered under the agreement between the United States Ferro Alloys Corporation and the Vanadium Corporation, respectively, have been allowed as deductions against profit which would have been realized under the terms of the original sales agreement.

49 In computing the capital net gain as shown above you are advised that this office holds that the amount of $338,815.50 paid by the Vanadium Corporation to the creditors of the United States Ferro Alloys Corporation constituted constructive receipt to the owners of the stock disposed of and, therefore, represents part of the purchase price to the Vanadium Corporation.

1925

| | | |
|---|---|---|
| Net income reported on return | | $36,146.44 |
| Capital net gain | | 279,803.34 |
| Total income | | $315,949.78 |
| Less: | | |
| Capital net gain reported | $279,803.34 | |
| Correct capital net gain | 8,880.13 | |
| | | 270,923.21 |
| Corrected total income | | $45,026.57 |
| Corrected capital net gain | | 8,880.13 |
| Income subject to surtax | | $36,146.44 |
| Less: | | |
| Dividends | $32,572.63 | |
| Personal exemption | 1,500.00 | |
| | | 34,072.63 |
| Income subject to normal tax | | $2,073.63 |
| Normal tax at 1½% on $2,073.81 | | $31.11 |
| Surtax on $36,146.44 | | 1,414.64 |
| Tax at 12½% on capital net gain of $8,880.13 | | 1,110.02 |
| Total tax | | $2,553.77 |
| Less: | | |
| Earned income credit | $7.78 | |
| Tax paid at source | 10.80 | |
| | | 18.58 |
| Total tax assessable | | $2,537.19 |
| Tax previously assessed | | 36,397.24 |
| Overassessment | | $33,860.05 |

## Explanation of Change

Due to having included the entire profit from the transaction involving stock of the United States Ferro Alloys Corporation and the Vanadium Corporation in 1924, the amount of $270,923.21 reported in 1925 as capital net gain on stock of the first-named company, has been eliminated from income, thus resulting in an overassessment of $33,860.05 for the year.

In connection with the overassessment of $33,860.05 for the year 1925 shown above as barred by the statute of limitation, you are advised that under date of February 1, 1929, you were informed of the possibility of such overassessment and it was suggested that you protect your rights to the same by the filing of a claim with the Collector of Internal Revenue for your district. Inasmuch as this office has no record of such claim having been filed and since the three-year period within which an allowance might have been made without the filing of a claim, has expired, no adjustment will be made for the year 1925.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A consent for the year 1924 extending the statutory period of limitations for making assessment against that year until December 31, 1930, is on file in this office.

51 Agreement as to final determination of tax liability

This agreement, made in duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between Mr. Parker Sloane, a taxpayer located at 8 East 62nd Street, New York, N. Y., and the Commissioner of Internal Revenue;

Whereas, there has been a determination of the tax liability of said taxpayer in respect of Federal Income Tax for the calendar years 1924 and 1925 in the principal sum of One Hundred Two Thousand Three Hundred Sixty Three Dollars and Eighty Four Cents ($102,363.84), exclusive of any penalty or interest properly applicable thereto as provided by law;

Now, this agreement witnesseth, that said taxpayer and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this agreement is approved by the Secretary of the Treasury, or the Undersecretary, within six months from the date this agreement is signed by the taxpayer.

In witness whereof, the above parties have subscribed their names to these presents in duplicate.

Signed this ------ day of ----------, 19--

----------,
*Taxpayer.*

By ----------,
----------

[If the taxpayer is a corporation affix its seal here.]

52 The above agreement has been approved by the Secretary of the Treasury, or the Undersecretary, in accordance with the provisions of Section 606 of the Revenue Act of 1928, the approval being specifically enumerated on—

Schedule No. ------
Dated ----------
Signed ----------, 19--
(Date)

----------,
*Commissioner of Internal Revenue.*
By----------

Waiver of restrictions on assessment and collection of deficiency

Irrespective of the execution or approval of the foregoing instrument, the undersigned taxpayer hereby waives the restrictions provided in Section 274 (a) or 308 (a) of the Revenue Act of 1926 or Section 272 (a) of the Revenue Act of 1928 on the assessment and collection of any deficiency in tax included in the principal sum of

the tax liability as set forth in the said instrument, together with any penalty or interest properly applicable thereto as provided by law.

----------,
*Taxpayer.*

By ----------,
----------

[If the taxpayer is a corporation affix its seal here.]

(See instructions on reverse side)

Original and duplicate to be accomplished and returned.

53 (272M)

NOTICE

Appeals should be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., in accordance with the rules of practice established by the Board

The United States Board of Tax Appeals is in no way connected with the Bureau of Internal Revenue or the Treasury Department. Under no circumstances should a petition on appeal be forwarded to the Commissioner or the Collector of Internal Revenue. If you decide to initiate a proceeding before the Board, your petition, proceedings, and proofs in the proceedings must be in accordance with the rules of practice of the Board, with Section 900 of the Revenue Act of 1924 and Section 1000 of the Revenue Act of 1926. Under the statute and the rulings of the Board a petition (together with a filing fee of $10.00) must be received and filed with the Board within sixty days from the date of mailing of the attached notice (not counting Sunday as the sixtieth day).

NOTICE

Interest at the rate of 6 per centum per annum computed as follows is due on all deficiencies in tax and will be included in notice and demand for payment.

54 For the years 1909 to 1920, inclusive, from February 26, 1926 (date of passage of the 1926 Act), to the date of assessment, or, in case of a waiver under Section 274 (d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For the years 1921 to 1924, inclusive, from the date prescribed for payment (or, if the tax is paid in installments, upon the part of the

deficiency prorated to each installment) to the date of assessment, or, in case of a waiver under Section 274 (d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For 1925 and subsequent years, from the date prescribed for the payment of the first installment to the date the deficiency is assessed, or, in case of a waiver under Sections 274 (d) of the 1926 Act or 272 (d) of the 1928 Act, to the thirtieth day after the filing of such waiver, whichever is the earlier.

The inclosed agreement when signed by you will constitute a waiver and will, if filed promptly, operate to curtail the amount of interest you will be obliged to pay since the interest period will terminate thirty days after filing, while without the waiver, assessment must be delayed sixty days from date of deficiency letter.

55 Before United States Board of Tax Appeals

[Title omitted.]

Answer, No. 47973

Filed Apr. 25, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that Commissioner erred as alleged in paragraph 4 (a), (b), and (c) of the petition.
5. Denies generally and specifically each and every allegation set forth in taxpayers' petition not hereinbefore admitted, qualified, or denied.

56 Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
*General Counsel, Bureau of Internal Revenue.*

Of Counsel:
PHILIP M. CLARK,
*Special Attorney, Bureau of Internal Revenue.*

PMC/IMM.
4/24/30.

Before United States Board of Tax Appeals

[Title omitted.]

*Motion for Consolidation*

Filed Jan. 28, 1932

Comes now the Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue,
57 and moves that the above entitled cases be consolidated for hearing, for the reason that the same question is involved in all three cases, and the same are now set for hearing on April 4, 1932.

Wherefore, it is prayed that the above entitled cases be consolidated for hearing.

(Signed) C. M. CHAREST,
C. M. CHAREST,
*General Counsel, Bureau of Internal Revenue.*

Of Counsel:
WILLIAM E. DAVIS and PAUL E. WARING,
*Special Attorneys, Bureau of Internal Revenue.*

Granted, Feb. 6, 1932.

(Signed) LOGAN MORRIS,
*Member, U. S. Board of Tax Appeals.*

Consolidated & cont'd. to Apr. 19, 1932.

58 Before United States Board of Tax Appeals

Docket Nos. 44061, 47451, 47973

JOHN J. WATTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HUGH C. SICARD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PARKER SLOANE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Findings of fact and opinion*

Promulgated August 11, 1933

The transaction herein detailed not resulting in a reorganization, gain or loss is to be recognized to petitioners.

John F. McCabe, Esq., James P. Quigley, Esq., and John J. Heberle, Esq., for the Petitioners.

59 W. E. Davis, Esq., and Paul Waring, Esq., for the respondent.

These proceedings, which were consolidated for hearing, involve the redetermination of deficiencies in the income taxes of the respective petitioners for the year 1924, amounting in each case to the sum of $63,441.83.

The issue is whether the petitioners respectively realized income from the transfer to the Vanadium Corporation of America of all the capital stock of the United States Ferro Alloys Corporation, or whether the transaction is exempt from taxation under section 203 (b) (2) of the Revenue Act of 1924.

*Findings of fact*

The United States Ferro Alloys Corporation (hereinafter called Ferro Alloys) was incorporated under the laws of the State of New York in January 1919 with a capital stock of $500,000, consisting of 5,000 shares of a par value of $100 each. Prior to the transaction herein involved the capital of the corporation was duly increased to the sum of $3,000,000, divided into 30,000 shares of a par value of $100 each, fully paid either in cash or property.

At the date of the agreement hereinafter referred to each of the petitioners herein owned one-third of the capital stock of Ferro Alloys.

On or about December 6, 1924, the petitioner Parker Sloane, as party of the first part, acting on his own behalf, and on behalf
60 of the other stockholders of Ferro Alloys, entered into a written agreement with the Vanadium Corporation of America (hereinafter referred to as the Vanadium Co.), as party of the second part, by which Sloane agreed to deliver to the party of the second part all of the 30,000 shares of the capital stock of Ferro Alloys. The Vanadium Co. is described in the agreement as a corporation incorporated under the laws of the State of Delaware, having its office at 120 Broadway, New York City.

The agreement recites that Sloane, individually and as trustee, owned and controlled all the outstanding issued shares of Ferro Alloys and was able to deliver to the Vanadium Co. duly endorsed certificates representing the entire interest in the assets of Ferro Alloys and was able to deliver to the Vanadium Co. all the certificates of stock of all subsidiary corporations owned by Ferro Alloys or in which it had an interest.

The agreement recites further that Sloane had represented that the assets of Ferro Alloys consist of about 30 acres of land at Niagara Falls, New York, together with the buildings, plant, machinery, equipment, and raw and finished supplies; also a certain lease of silica or sandstone quarries situated at Lewiston, New York, contracts covering the delivery of electric power, certain processes and patents, a certain contract covering the delivery of chrome ore; also all outstanding and issued shares of the Colonial Chrome Co., Ltd.,

which owned a plant, real estate, and a mine at Black Lake in the Province of Quebec, Canada; and also certain contracts not specifically described.

The recitals of the agreement also set forth the net worth of
61 the Ferro Alloys as of May 1924 as the sum of $3,477,575.80.

It is stated that this sum includes the sum of $338,815.50, representing advances to Ferro Alloys on chrome contracts of $298,815.50 and $40,000 due for unused power which is being paid and canceled.

The agreement also recites the obligations and liabilities of Ferro Alloys and it is stated that approximately $255,000 of the liabilities for materials delivered, labor, expenses, and accruals is assumed by the Vanadium Co. and will be paid out of current assets of Ferro Alloys.

Among other recitals the agreement contains the following:

"Whereas, said Parker Sloane is exchanging and delivering to and with the Vanadium Corporation of America Thirty Thousand (30,000) shares of the stock of the United States Ferro Alloys Corporation, organized under the laws of the State of New York, each of the par value of One Hundred Dollars ($100.00) and aggregating Three Million Dollars ($3,000,000.00) and being the total capital stock of said Corporation; and

"Whereas, the Vanadium Corporation of America is exchanging and delivering to said Parker Sloane, Trustee for the owners of said United States Ferro Alloys Corporation stock 66,666⅔ shares of the stock of the Vanadium Corporation of America, each share being without par value, together with bonds of the United States Ferro Alloys Corporation, aggregating One Million, One Hundred Sixty-one Thousand One Hundred and Eighty-four Dollars and 50/100 ($1,161,184.50) secured by a Trust Mortgage on its
62 land and plant at Niagara Falls and guaranteed as to payment of principal and interest by the said Vanadium Corporation of America, together with an assumption of the immediate payment by the Vanadium Corporation of America of certain due obligations as hereinafter set forth."

Article I of the agreement reads as follows:

"That the parties hereto do hereby fix the following as a complete understanding and agreement as to the terms and conditions of said exchange. The said Parker Sloane shall or does hereby exchange, transfer, and deliver to the said Vanadium Corporation of America, all the issued and outstanding stock of the United States Ferro Alloys Corporation, comprising Thirty Thousand (30,000) shares, and will have the present Directors and Officers resign to the intent that the Vanadium Corporation of America may replace same at its discretion.

"Said exchange shall cover and entitle the party of the second part to all the assets of the said United States Ferro Alloys Corporation as of December 23rd, 1924, including all the assets mentioned herein

and all the shares of stock in any subsidiary or subsidiaries owned by said United States Ferro Alloys Corporation or in which the Corporation has an interest.

"The said Vanadium Corporation of America shall or does hereby exchange, transfer, and deliver to said Parker Sloane as aforesaid, 66,666⅔ shares of the stock of said Vanadium Corporation of America, each share being of no par value."

63 The said Vanadium Corporation of America hereby causes to be issued and delivered to said Parker Sloane valid bonds to the amount of One Million, One Hundred Sixty-one Thousand One Hundred Eighty-four Dollars and Fifty Cents ($1,161,184.50) each for One Thousand ($1,000.00) Dollars except one bond for One hundred eighty-four Dollars and Fifty Cents ($184.50) bearing interest at 6% payable January 1st and July 1st of each year, and the said principal being payable as follows:

| | | | |
|---|---|---|---|
| $161,184.50 | February | 1, | 1925 |
| 150,000.00 | January | 1, | 1926 |
| 150,000.00 | " | 1, | 1927 |
| 150,000.00 | " | 1, | 1928 |
| 150,000.00 | " | 1, | 1929 |
| 150,000.00 | " | 1, | 1930 |
| 150,000.00 | " | 1, | 1931 |
| 100,000.00 | " | 1, | 1932 |

$1,161,184.50

said bonds to be secured by a Trust Mortgage or deed on the entire plant, property and equipment of the United States Ferro Alloys Corporation at Niagara Falls, New York, and the payment of the principal and interest of said bonds to be duly and properly guaranteed by said Vanadium Corporation of America. Said mortgage and bonds shall provide that they are to have no voting power, and shall be preferred over all present or future stock issues of said United States Ferro Alloys Corporation, and in dissolution,

64 liquidation, merger and distribution of dividends and assets.

Besides the usual default clauses, there shall be provided a default clause to the effect that the Vanadium Corporation of America shall always have on hand for the use of the Niagara Falls Plant or in good faith contracted for in advance, at least sixty (60) days' supply of such materials and products as may be necessary and sufficient to employ the power now under contract with The Niagara Falls Power Company, together with the usual provisions in a mortgage of this character, which shall be approved by said Parker Sloane or his Counsel representing him in this transaction, including an insurance clause, a clause to provide for the privilege of payment of part or all of the principal remaining due at any time on 90 days notice, and a clause to the effect that the machinery, equipment and buildings, and entire plant shall be kept in good order and repair, to the intent that there shall be no deterioration of the value or productive capacity of said plant, and that all taxes, water rates, assessments and government charges

shall be properly paid and discharged; said Trust Mortgage shall be deposited in escrow with Guaranty Trust Company. Said bonds shall further provide that in case the holder thereof desires to part with the possession of any of said bonds, they will first be offered to the party of the second part at par and accrued interest and the party of the second part has the option to accept or reject said offer within ten days.

65 The Vanadium Corporation of America further agrees that upon the receipt of the Thirty Thousand (30,000) shares of the United States Ferro Alloys Corporation stock aforesaid that it will immediately forthwith pay or cause to be paid in cash, Two Hundred Ninety-eight Thousand Eight Hundred and Fifteen Dollars and Fifty Cents ($298,815.50) as directed by Parker Sloane, to the holders of certain obligations in the form of chrome contracts and representing moneys heretofore advanced to said United States Ferro Alloys Corporation, and upon the further production by said Parker Sloane or other person, of proper assignment or cancellation or under or by his direction of certain obligations amounting to Forty Thousand Dollars ($40,000.00) claimed to be due to the Niagara Falls Power Co. by the said United States Ferro Alloys Corporation, that thereupon the Vanadium Corporation of America will forthwith immediately pay the said Parker Sloane or as directed by him said sum of Forty Thousand Dollars ($40,000.00).

Pursuant to the terms of the contract the parties agreed that it should be fully performed and carried out at noon on December 19. 1924, at which time all the shares of Ferro Alloys, including all shares of its subsidiary corporation, duly endorsed and assigned to the party of the second part together with the resignations of the officers and directors of each corporation should be delivered to the Vanadium Co. and that the Vanadium Co. should thereupon place 66,666⅔ shares of its stock in escrow with Guaranty Trust

66 Co. and should duly deliver to Ferro Alloys the bonds hereinbefore described and immediately pay the amounts it had "assumed to pay" under the provisions of Article I of the agreement.

The agreement provides for a complete audit of the business, properties, and profits of Ferro Alloys and the parties agreed that the escrow deposit with the Guaranty Trust Co. should be dissolved on January 1, 1926, and that the exact number of shares of Vanadium Co. to be then delivered to Sloane for himself and the other parties entitled thereto should be determined on the basis of the earning power of Ferro Alloys demonstrated during 1925.

By a supplemental agreement dated December 18, 1924, entered into by the parties to the original agreement, the amount of its stock which the Vanadium Co. was to "exchange, transfer, and deliver to Sloane as trustee was reduced to 33,333⅓ shares.

The stock of Vanadium Co. was of no par value and for the purposes of the agreement its value was fixed at $30 per share.

The contract was duly executed in accordance with its terms, but as a result of the demonstrated earning power of Ferro Alloys during the year 1925 only 32,103 shares of the stock of the Vanadium Co. were delivered to Sloane for himself and the other persons entitled thereto upon the dissolution of the escrow with the Guaranty Trust Co.

Concurrently with the closing of the transaction and in accordance with the terms of the agreement, the Vanadium Co. paid to
67 creditors of Ferro Alloys the sum of $338,815.50; $298,815.50 being paid to one Louise M. Higham and $40,000 being paid to the Niagara Falls Power Co. After these payments to the two creditors the Vanadium Co. appeared on the books of Ferro Alloys as a creditor to "the extent of $338,000."

On July 2, 1928, a certificate of the dissolution of Ferro Alloys was filed in the office of the Secretary of State of the State of New York.

In the respective deficiency letters the respondent held in substance that the transaction herein involved was a sale of the 30,000 shares of Ferro Alloys for the sum of $2,500,000, made up as follows:

| | |
|---|---|
| 33,333⅓ shares of Vanadium Corporation stock at $30 a share | $1,000,000.00 |
| Bonds taken as part payment | 1,161,184.50 |
| Payment to Louise M. Higham | 298,815.50 |
| Payment to Niagara Power Co | 40,000.00 |
| | 2,500,000.00 |

The respondent computed the capital net gain of each of the petitioners as follows:

| | | |
|---|---|---|
| Received for total stock of United States Ferro Alloys Corporation | | $2,500,000.00 |
| Alloys Corporation | $338,815.50 | |
| 2. Additional cost allowed | 43,363.08 | |
| 3. Value of undelivered stock | 36,910.00 | |
| | | 419,088.58 |
| Net sale price | | 2,080,911.42 |
| ⅓ interest | | 693,637.14 |
| Cost of stock | | 186,102.49 |
| Capital net gain | | 507,534.65 |

The sum of $43,363.08 described in the respondent's computation as "additional cost allowed" represents the liability of the petitioners under their agreement with the Vanadium Co. for taxes against the year 1924.

In computing the capital net gain the respondent stated that it was held that the amount of $338,815.50 "paid by the Vanadium Corporation to the creditors of the United States Ferro Alloys Corporation constituted constructive receipt to the owners of the stock disposed of and, therefore, represents part of the purchase price to the Vanadium Corporation." It was stipulated at the hearing that the payment of this sum by the Vanadium Co. did not make the same income to the ptitioners.

*Opinion*

VAN FOSSAN: The petitioners in these proceedings contend that they exchanged all of the stock of Ferro Alloys for stock of the Vanadium Co. and bonds of Ferro Alloys guaranteed by the Vanadium Co.; that these two corporations were parties to a reorganization and that, therefore, under the provisions of section 203 (b) (2) of the Revenue Act of 1924, no gain may be recognized. The respondent, on the other hand, contends that the transaction between Sloane and the Vanadium Co. was a sale by the petitioners
69 of all of the capital stock of Ferro Alloys and that it resulted in the creation of income taxable to the petitioners.

The applicable statutes are sections 202 and 203 of the Revenue Act of 1924. Section 202 provides, in part, as follows:

(a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be excess of such basis over the amount realized.

* * * * * * *

(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purpose of this title, shall be determined under the provisions of section 203.

Section 203 provides, in part:

(a) Upon the sale or exchange of property the entire amount of the gain or loss determined under section 202 shall be recognized, except as hereinafter provided in this section.

* * * * * * *

(b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * * * *

70 (h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation) * * *.

In our opinion the determinative question is that of reorganization and, unless the transaction stated in the findings of fact constituted a reorganization of Ferro Alloys and the Vanadium Co., it is unnecessary to discuss whether there was an actual sale of the stock of Ferro Alloys by the petitioners or whether the transaction was an exchange of all of the stock of Ferro Alloys for stock of the Vanadium Co. and bonds of Ferro Alloys. If the two corporations

were not parties to a reorganization the gain, if any, accruing to the petitioners by reason of the transaction is taxable.

Under the provisions of section 203 (h) (1) (A), hereinbefore quoted, the term "reorganization" means a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation). While the Vanadium Co. acquired all the capital stock of Ferro Alloys and, therefore, obtained a full and complete control of the
71 latter corporation, we are of the opinion that it does not appear that the two corporations were either consolidated or merged. A consolidation of two corporations involves the dissolution of both and the transfer of their corporate assets and franchise to a new corporation. In a merger, on the other hand, one of two merged corporations loses its identity in the other. One corporation goes out of existence; the other corporation survives and the latter absorbs the property and franchises of the merged corporation whose stock it has acquired. Railroad Co. v. Georgia, 98 U. S. 359, 362; Matter of Bergdorf, 206 N. Y. 309; 99 N. E. 714; Irvine v. N. Y. Edison Co., 207 N. Y. 425; 101 N. E. 358; Pinellas Ice & Cold Storage Co. v. Commissioner, 57 Fed. (2d) 188; affd., 287 U. S. 462; Cortland Specialty Co. v. Commissioner, 60 Fed. (2d) 937.

In the Cortland Specialty Co. case, supra, cited with approval by the Supreme Court in Pinellas Ice & Cold Storage Co. v. Commissioner, supra, the Circuit Court of Appeals for the Second Circuit, referring to state statutes relating to the consolidation and merger of corporations, said:

"Undoubtedly such statutes vary in the different states particularly in respect to how far the constituent companies may be deemed to survive the creation of the *new or modified corporate structure*, but we believe that the general purpose of them all has been to continue the interests of those owning enterprises, which have been merged or consolidated, in another corporate form. • • • When
72 describing the kind of change in corporate structure that permits exemption from these taxes, Section 203 *does not disregard the necessity of continuity of interests under modified corporate forms.* Such is the purpose of the word 'reorganization' in Sec. 203 (b) (3) where a corporation exchanges its property 'solely for stock or securities.'" [Italics ours.]

The petitioners contend that there was a merger of the two corporations arising out of the provisions of the agreement between Sloane and the Vanadium Co. In our opinion the evidence does not lead to this conclusion. Under the provisions of the agreement the Vanadium Co. did acquire all of the capital stock of Ferro Alloys. This acquisition, however, created merely a change in the stock ownership of the latter company. The agreement contains no provisions looking to the creation of a "new or modified corporate structure."

Therefore, although the former stockholders of Ferro Alloys secured for their stock in that company an interest in Vanadium Co., the transaction was not within the provisions of section 203 (b)(2) for the reason that their interest was not continued under a new or modified corporate form.

Section 203 (b)(2) provides that "no gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities", etc. The evidence discloses no plan of reorganization and the agreement between Sloane and the Vanadium Co. contains none. There is no provision in the agreement that
73 Ferro Alloys should be dissolved upon the performance of the agreement. On the contrary, there is evidence in the terms of the agreement that it was the intention of the parties thereto that that company was to maintain its separate corporate entity after the performance of the contract and the delivery of the stock of Ferro Alloys owned by the petitioners. Part of the consideration paid to the petitioners for the stock transferred by them was, under the terms of the agreement, bonds of Ferro Alloys. Some of these bonds, unless previously called, were not to mature prior to January 1, 1932, or eight years after the execution of the agreement and six years after the date provided in the agreement for the dissolution of the escrow deposit of the Vanadium Co.'s stock. At the very time, therefore, when it is contended that a merger of Ferro Alloys was effected it was provided that Ferro Alloys should issue obligations not maturing before 1932. At such time, therefore, it could not have been in contemplation of the parties that Ferro Alloys would be dissolved upon the performance of the agreement set out in the findings of fact.

It appears that the Vanadium Co. was incorporated under the laws of the State of Delaware and had its office in New York City. Presumptively, therefore, it was authorized as a foreign stock corporation under the laws of the State of New York to do business in that State. Ferro Alloys was organized under the laws of the State of New York. Section 85 of article 8 of the Stock Corporation Law of the State of New York, relating to the merger of corporations, provides in effect, among other things, that any foreign stock corporation authorized to do business
74 in the State of New York owning all the stock of any domestic stock corporation may file in the office of the secretary of state a certificate of such ownership, duly executed in accordance with the provisions of the section, and that thereupon all of the estate, property, rights, privileges, and franchises of such other corporation shall vest in and be held and enjoyed by such possessor corporation as fully and entirely as the same were before held by such other corporation.

The evidence does not disclose that the Vanadium Co. at any time filed the certificate provided in the quoted statute. While it may

be that a legal merger of Ferro Alloys and the Vanadium Co. might be effected without the filing of the certificate provided, yet evidence that the certificate had been filed contemporaneously with performance of the agreement between Sloane and the Vanadium Co. would be of weight with reference to the intent of the parties to merge Ferro Alloys with the Vanadium Co. Lack of such evidence is at least of some significance respecting the existence of a contrary intent.

It is true that the facts show that Ferro Alloys was dissolved in July 1928 but this date was several years after the performance of the agreement and the dissolution can not, therefore, be held to be evidence that an intention to merge the two corporations existed at the time of the performance of the transaction now in question.

It seems to us apparent that neither a merger nor a consolidation in the ordinary sense of the words occurred, nor do we believe in the face of the facts that the transaction was one of those
75 "things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words * * *" embracing "circumstances difficult to delineate but which in strictness can not be designated as either a merger or consolidation", as was observed by the Supreme Court in Pinellas Ice & Cold Storage Co., supra. While the Supreme Court indicated in the above decision that it deemed the opinion of the circuit court in the Pinellas case to be too strict and that the language in parentheses in the statutory definition of a reorganization was intended to work an expansion or enlargement of the meaning of the words, it remains for us to determine whether the instant situation satisfies such expanded definition. In the construction of the language referred to the words "merger or consolidation" are still of guiding import. The transaction must resemble a merger or consolidation, though it fails to satisfy all of its legal requirements.

In the case before us, as already appears, there are certain facts of importance that weigh heavily against a conclusion that the transaction was "of the nature of a merger or consolidation." Definite evidence of an intention to effect a merger or consolidation is lacking. There was no provision for the dissolution of Ferro Alloys. The commitments assumed by it indicate an intended continuation of existence. Such obligations are not consistent with impending extinction. We believe them to be so foreign to the concept of a merger or consolidation that it cannot be said that the transaction partook of the nature of a merger or consolidation. We, therefore, conclude that the transaction here involved did not
76 constitute a reorganization under the statute and that any gain resulting to the petitioners therefrom must be recognized.

There is another fact which injects itself into the consideration of the case, and that is the agreement on the part of the Vanadium Co. to pay in cash the sum of $298,815.50 to the holders of certain

obligations due under chrome contracts with Ferro Alloys and $40,000 to petitioner Sloane or his nominee on account of obligations due to the Niagara Falls Power Co. from Ferro Alloys. Though the parties stipulated that these payments did not of themselves constitute income to the petitioners, this does not remove the question of the effect of these payments on the alleged reorganization. Ferro Alloys was obligated on these accounts to the amount of $338,815.50. When Vanadium paid these accounts Ferro Alloys was relieved of the obligations to the creditors to the same extent as though it had been paid the cash by Vanadium and had in turn paid the obligations in the stated amount. Thereafter Vanadium appeared on the books of Ferro Alloys as a creditor. In view of these facts, can it be said that the consideration for the delivery of Ferro Alloys stock was solely stock or securities?

The petitioners have not objected to the valuation of the securities made by the respondent in his computation of the deficiency in tax. This valuation must, therefore, be presumed to be correct.

Decision will be entered under Rule 50.

77 Before United States Board of Tax Appeals

[Title omitted.]

*Order for Review by Board, August 23, 1933*

Pursuant to the authority contained in section 601 (b) of the Revenue Act of 1928, I hereby direct that the report of Division No. 9 in the above-entitled proceedings, dated July 26, 1933, and promulgated August 11, 1933, be reviewed by the Board.

(Signed) EUGENE BLACK,
*Acting Chairman.*

Dated, Washington, D. C., August 23, 1933.

78 Before United States Board of Tax Appeals,
Washington

Docket Nos. 44,061, 47,451, 47,973

JOHN J. WATTS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Order of Affirmance of Board, October 17, 1933*

The report and determination of Division No. 9 in the above entitled proceedings was promulgated on August 11, 1933, and thereafter on August 23, 1933, referred to the Board by the Acting Chairman under the provisions of Section 601 (b) of the Revenue Act of 1928 for review.

Said review having been had by the Board on October 13, 1933, it is

Ordered: That the report and determination above mentioned be and the same is hereby affirmed.

By the Board:

LOGAN MORRIS,
*Chairman.*

Dated, October 17, 1933.

STERNHAGEN, concurring: I agree that this was not a statutory reorganization, but I would place less emphasis upon the omission to dissolve the Ferro Corporation. In other words, I should
79 say that in a case which was otherwise within part (A) of the definition, there might be a statutory reorganization despite the continued legal existence of the corporations involved.

Leech and Adams agree with the above.

Trammell, dissenting: In my opinion, the facts in this case bring it squarely within the reorganization provisions of the statute as interpreted by the Supreme Court in the Pinellas case and by the court of appeals in the Cortland Specialty case, cited in the above case. The reorganization provisions do not require that one corporation be dissolved. The reorganization as defined in the statute is not limited to a technical merger or reorganization, but is made broader by the parenthetical clause. There was, in my opinion, the continuing interest which the above decisions referred to as being necessary.

ARUNDELL, dissenting: In my opinion the facts bring the case within the reorganization provisions of the statute. I think that too much stress is placed on the fact that dissolution of Ferro Alloys was delayed for several years after the acquisition of its stock by Vanadium. The statute does not in terms require dissolution at any time. While dissolution is a usual concommitant of a strict merger or consolidation, the parenthetical clause in Section 203 (h) (1) extends the application of the statute "to include some
80 things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462. The effect of the majority opinion is to disregard the words within the parenthesis and this the Supreme Court in the Pinellas case has said very difinetil may not be done. Nor is it material that petitioners received bonds of the Ferro Alloys Co. as well as stock in the Vanadium Co. Section 203 (b) (2) contemplates just such cases. There was here present that continuity of interest emphasized in Cortland Specialty Co. v. Commisisoner, 60 Fed. (2d) 937, and Pinellas Ice & Cold Storage Co., supra.

SMITH, BLACK, and GOODRICH agree with the above dissent.

81 Before United States Board of Tax Appeals

Docket No. 44061

JOHN J. WATTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decision*

Pursuant to the findings of fact and opinion of the Board promulgated August 11, 1933, the respondent herein on December 18, 1933, filed a notice of settlement and proposed computation, and the petitioner on January 9, 1934, having filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered and decided that there is a deficiency in income tax of $63,441.83 for the year 1924.

Enter:

Entered Jan. 13, 1934.

(Signed) ERNEST H. VAN FOSSAN,
*Member.*

[SEAL.]

82 Before United States Board of Tax Appeals

Docket No. 47451

HUGH C. SICARD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decision*

Pursuant to the findings of fact and opinion of the Board promulgated August 11, 1933, the respondent herein on December 18, 1933, filed a notice of settlement and proposed computation, and the petitioner on January 8, 1934, having filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered and decided that there is a deficiency in income tax of $63,441.83 for the year 1924.

Enter:

Entered Jan. 15, 1934.

(Signed) ERNEST H. VAN FOSSAN,
*Member.*

[SEAL.]

83 Before United States Board of Tax Appeals

Docket No. 47973

PARKER SLOANE, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decision*

Pursuant to the findings of fact and opinion of the Board promulgated August 11, 1933, the respondent herein on December 18, 1933, filed a notice of settlement and proposed computation, and the petitioner on January 8, 1934, having filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered and decided that there is a deficiency in income tax of $63,441.83 for the year 1924.

Entered Jan. 15, 1934.

(S) ERNEST H. VAN FOSSAN,
*Member.*

[SEAL.]

84 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

*Petition for review, No. 44061*

Filed Feb. 7, 1934

To the honorable judges of the United States Court of Appeals for the Second Circuit:

The taxpayer, John J. Watts, the Petitioner in this case, by John F. McCabe, his Counsel, hereby files a petition for a review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the United States Board of Tax Appeals rendered on January 13, 1934, determining a deficiency in the petitioner's federal income tax for the calendar year 1924, in the amount of $63,441.83, and respectfully shows:

I

The petitioner on review (hereinafter referred to as the taxpayer) is an individual residing at No. 131 Riverside Drive,
85 New York, N. Y. The respondent on review (hereinafter referred to as the Commissioner) is a duly appointed, qualified, and acting Commissioner of Internal Revenue of the United

States, holding his office by virtue of the laws of the United States. The taxpayer filed his income-tax return for the calendar year 1924 with the Collector of Internal Revenue for the Third District of New York and the office of the said Collector of Internal Revenue is located within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner determined a deficiency in income taxes for the calendar year 1924 in the amount of $63,441.83, and, on March 13, 1929, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The said appeal was heard in a trial held by the said Board on April 19, 1932, the Hon. Ernest H. Van Fossan, sitting for the Board. Thereafter, on August 11, 1933, the Board of Tax Appeals promulgated its findings of fact in and opinion in said appeal. On August 21, 1933, the taxpayer made a motion for a Review by the Board of the said opinion or Report, and upon consideration of the motion and the said Report, the Board ordered that the said Report and determination be affirmed—but with five dissents to the majority opinion.

86 Thereafter, on January 13, 1934, the Board entered a judgment and final order of redetermination in which the Board ordered and decided that there was a deficiency in income tax for the year 1924 in the amount of $63,441.83.

III

NATURE OF THE CONTROVERSY

The deficiency which was in controversy before the Board of Tax Appeals arose or resulted from the determination of the Commissioner in setting up a capital gain of $507,534.65 in respect to the so-called "sale" of the taxpayer's stock in the United States Ferro Alloys Corporation to the Vanadium Corporation. At the trial the taxpayer contended that the transaction was an exchange of his stock of the United States Ferro Alloys Corporation for stock and securities of the Vanadium Corporation, under the reorganization provisions of the Revenue Act of 1924 and the regulations pertaining thereto.

The taxpayer further contended and adduced evidence at the trial that he did not receive either money or other property additional to the stock and bonds received in exchange for his stock and therefore he maintained that he did not incur any tax liability in 1924 in respect to the said transaction. As to certain payments made to third party creditors, the Commissioner conceded at the trial that such payments did not give rise to taxable income.

The Board of Tax Appeals held that the determinative question is that of reorganization and unless the transaction stated in
87 the findings of fact constituted a reorganization of Ferro Alloys and the Vanadium Corporation, then the transaction is taxable, and it is unnecessary to discuss whether or not the transaction was a sale or whether it was an exchange. The Board of Tax Appeals further held that, contrary to the previous understanding and regulations dealing with this question, unless the taxpayer could show that there had been either a merger or a consolidation (in the strict, technical sense of these terms), there cannot be a tax-free reorganization under the statute. Thereupon, the Board found that the transaction here involved did not constitute a reorganization under the statute.

IV

The said taxpayer, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

V

The taxpayer says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the taxpayer, and

The petitioner assigns the following errors; and each of them, which he avers, occurred in the said record, proceedings, decision, and final order of the Board and upon which he relies to
88 reverse the said decision and final order so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board erred in holding that the determinative question is solely that of reorganization and unless the transaction stated in the findings of fact constituted a reorganization, according to the Board's own narrow definition of this term, then the transaction is taxable.

2. The Board erred in holding that unless there had been either (a) a merger, or (b) a consolidation (in the technical sense of these terms), there could not be a reorganization under Section 203 (b) (2) of the Revenue Act of 1924.

3. The Board erred in holding that the transaction by which the taxpayer exchanged his stock in the United States Ferro Alloys Corporation for stock of the Vanadium Corporation and bonds, guaranteed by the Vanadium Corporation, constituted a sale and not an exchange under the Revenue Act.

4. The Board erred in finding that there was no provision for the dissolution of the United States Ferro Alloys Corporation and in further assuming that the statute requires the immediate dissolution of one of the corporations in order to make the transaction constitute a merger or consolidation.

5. The Board erred in finding that because the Ferro Alloys Corporation was not immediately dissolved the continuing interest of the stockholders was fatal to a tax-free reorganization.

89 6. The Board erred in failing to hold that the petitioner exchanged all of his stock of the United States Ferro Alloys Corporation for stock of the Vanadium Corporation and bonds, guaranteed by the Vanadium Corporation, in the manner permitted under Section 203 (b) (2) of the Revenue Act of 1924.

7. The Board erred in failing to find that the transaction described in the findings of fact and opinion was one in which "no gain or loss shall be recognized" pursuant to Section 203 of the Revenue Act of 1924.

8. The Board erred in that its opinion and decision are not supported by the findings of fact.

9. The Board erred in that its opinion and decision are not supported by statute (Revenue Act of 1924) or by the regulations pertaining thereto.

VI

WHEREFORE, the taxpayer petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit and that a transcript of the record be prepared in accordance with the law and with the rules of the said Court and be transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court.

(s) JOHN F. MCCABE,
*Counsel for the Petitioner,*
*120 Broadway, New York, N. Y.*

90 [*Duly sworn to by John F. McCabe; jurat omitted in printing.*]

91 In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

*Notice of filing petition for review, no. 44061*

Filed Feb. 7, 1934

To Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C.

Please take notice that the above taxpayer did, on the day of February 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled

case. A copy of the petition for review and the assignments of error as filed is hereby attached and served upon you.

Dated, this day of February 1934.

(Signed) JOHN F. McCABE,
JOHN F. McCABE,
*Attorney for Petitioner,*
*120 Broadway, New York, N. Y.*

92 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this day of , 1934.

E. BARRETT PRETTYMAN,
*General Counsel, Bureau of Internal Revenue,*
*Attorney for Respondent on Review.*

Before United States Board of Tax Appeals

[Title omitted.]

*Petition for review, no. 47451*

Filed Feb. 7, 1934

To the honorable judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes Now the petitioner Hugh C. Sicard by his attorneys James P. Quigley and Robert J. Heberle, and respectfully shows:

93 I

The petitioner, an individual residing at No. 32 East 64th Street, New York City, filed an income tax return for the calendar year 1924, in the office of the Collector of Internal Revenue for the Third District of New York, which is within the jurisdiction of this court; and accordingly, he respectfully petitions this court to review a decision and final order, entered against him by the United States Board of Tax Appeals on January 15, 1934, in which he is held liable for a tax deficiency of $63,441.83 on his said return.

II

On December 6, 1924, the petitioner owned one-third of the capital stock of United States Ferro Alloys Corporation—hereinafter called Ferro Alloys, and on behalf of himself and the owners of the other two-thirds, he executed a contract with Vanadium Corporation of America—hereinafter called Vanadium, wherein he agreed to deliver to Vanadium all of the capital stock of Ferro Alloys, and Vanadium agreed to deliver to him certain shares of its own capital stock and also bonds of Ferro Alloys guaranteed by it. Vanadium also

agreed to pay certain amounts to creditors of Ferro Alloys, and to thus become its creditor in their stead. All of those undertakings were performed substantially as agreed.

The petitioner, having exchanged his Ferro Alloys stock solely for other stock and bonds, returned the transaction as an exchange in which the statute provides that no gain or loss shall be recog-
94 nized; but the Commissioner held that it resulted in a capital net gain on which he determined to assess the petitioner with a tax deficiency of $63,441.83.

The Commissioner also made similar findings against each of the other two owners of stock in Ferro Alloys, and all three having appealed from his conclusions, their cases were consolidated for hearing.

The Board of Tax Appeals (with five members dissenting) has now sustained the Commissioner and has entered an order against this petitioner for said tax deficiency.

## III

The question presented is whether or not the Board of Tax Appeals has properly interpreted the following provisions of the Revenue Act of 1924 on which it relies:

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

SEC. 203. (b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

SEC. 203. (h) (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a
95 majority of the total number of shares of all other classes of stock of another coporation, or substantially all the properties of another corporation), or (B) * * *

SEC. 203 (h) (2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stocks of another corporation.

## IV

The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in deciding that the exchange of securities in this case, is not exempt from recognition of gain be-

cause the reorganization which it effected did not result in the dissolution of either of the involved corporations.

2. The Board of Tax Appeals erred in not deciding that in pursuance of the plan of reorganization, the petitioner exchanged stock in Ferro Alloys solely for stock in Vanadium and bonds of Ferro Alloys, and that no gain or loss should be recognized as a result of that exchange because both corporations were parties to a reorganization in which all of the stock of Ferro Alloys was similarly acquired by Vanadium.

Wherefore, the petitioner prays that a transcript of the
96 record of this proceeding, be prepared in accordance with the law and the rules of the United States Circuit Court of Appeals for the Second Circuit, and that it be transmitted to the clerk of said court for filing; and that the decision and order of the Board of Tax Appeals herein be reviewed by the said court, and that appropriate action be taken to the end that the errors herein complained of may be corrected.

(S) JAMES P. QUIGLEY,
(S) ROBERT J. HEBERLE,
*Attorneys for the Petitioner,*
*43 Cedar Street, New York City, N. Y.*

[*Duly sworn to by James P. Quigley, jurat omitted in printing.*]

97 Before United States Board of Tax Appeals

[Title omitted.]

*Notice of filing petition for review, No. 47451*

Filed Feb. 7, 1934

To: E. BARRETT PRETTYMAN, ESQ.,
*General Counsel, Bureau of Internal Revenue,*
*Attorney for Respondent.*

You are hereby notified that a Petition for Review in the above-entitled cause was filed with the United States Board of Tax Appeals on the day of February, 1934.

A copy of said petition is served upon you herewith.

(S) JAMES P. QUIGLEY,
(S) ROBERT J. HEBERLE,
*Attorneys for the Petitioner,*
*43 Cedar Street, New York City, N. Y.*

Service accepted this 7th day of Feb., 1934.

(S) E. BARRETT PRETTYMAN,
*General Counsel, Bureau of Internal Revenue,*
*Attorney for Respondent.*

98 Before United States Board of Tax Appeals

[Title omitted.]

*Petition for review, No. 47973*

Filed Feb. 7, 1934

To the honorable judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes Now the petitioner Parker Sloane by his attorneys James P. Quigley and Robert J. Heberle, and respectfully shows:

I

The petitioner, an individual residing at No. 8 East 62nd Street, New York City, filed an income tax return for the calendar year 1924, in the office of the Collector of Internal Revenue for the Third District of New York, which is within the jurisdiction of this court; and accordingly, he respectfully petitions this court to review a decision and final order, entered against him by the United States Board of Tax Appeals on January 15, 1934, in which he is held liable for a tax deficiency of $63,441.83 on his said return.

99 II

On December 6, 1924, the petitioner owned one-third of the capital stock of United States Ferro Alloys Corporation—hereinafter called Ferro Alloys, and on behalf of himself and the owners of the other two-thirds, he executed a contract with Vanadium Corporation of America—hereinafter called Vanadium, wherein he agreed to deliver to Vanadium all of the capital stock of Ferro Alloys, and Vanadium agreed to deliver to him certain shares of its own capital stock and also bonds of Ferro Alloys guaranteed by it. Vanadium also agreed to pay certain amounts to creditors of Ferro Alloys, and to thus become its creditor in their stead. All of those undertakings were performed substantially as agreed.

The petitioner, having exchanged his Ferro Alloys stock solely for other stock and bonds, returned the transaction as an exchange in which the statute provides that no gain or loss shall be recognized; but the Commissioner held that it resulted in a capital net gain on which he determined to assess the petitioner with a tax deficiency of $63,441.83.

The Commissioner also made similar findings against each of the other two owners of stock in Ferro Alloys, and all three having appealed from his conclusions, their cases were consolidated for hearing.

The Board of Tax Appeals (with five members dissenting) has now sustained the Commissioner and has entered an order against this petitioner for said tax deficiency.

100

III

The question presented is whether or not the Board of Tax Appeals has properly interpreted the following provisions of the Revenue Act of 1924 on which it relies:

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

SEC. 203. (b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

SEC. 203. (h) (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) * * *

SEC. 203. (h) (2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corpora-

101 tion of the voting stock and at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

IV

The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in deciding that the exchange of securities in this case, is not exempt from recognition of gain because the reorganization which it effected did not result in the dissolution of either of the involved corporations.

2. The Board of Tax Appeals erred in not deciding that in pursuance of the plan of reorganization, the petitioner exchanged stock in Ferro Alloys solely for stock in Vanadium and bonds of Ferro Alloys, and that no gain or loss should be recognized as a result of that exchange because both corporations were parties to a reorganization in which all of the stock of Ferro Alloys was similarly acquired by Vanadium.

Wherefore, the petitioner prays that a transcript of the record of this proceeding, be prepared in accordance with the law and the rules of the United States Circuit Court of Appeals for the Second Circuit, and that it be transmitted to the clerk of said court for

filing; and that the decision and order of the Board of Tax Appeals herein be reviewed by the said court, and that appropriate
102 action be taken to the end that the errors herein complained of may be corrected.

(S) JAMES P. QUIGLEY,
(S) ROBERT J. HERERLE,
*Attorneys for the Petitioner,*
*43 Cedar Street, New York City, N. Y.*

[*Duly sworn to by Parker Sloane; jurat omitted in printing.*]

103 Before United States Board of Tax Appeals

[Title omitted.]

*Notice of Filing Petition for Review, No. 47973*

Filed Feb. 7, 1934

To: E. BARRETT PRETTYMAN, ESQ.,
*General Counsel, Bureau of Internal Revenue,*
*Attorney for Respondent.*

You are hereby notified that a Petition for Review in the above-entitled cause was filed with the United States Board of Tax Appeals on the day of February, 1934.

A copy of said petition is served upon you herewith.

(S) JAMES P. QUIGLEY,
(S) ROBERT J. HERERLE,
*Attorneys for the Petitioner,*
*43 Cedar Street, New York City, N. Y.*

Service accepted this 7th day of Feb., 1934.

(S) E. BARRETT PRETTYMAN,
*General Counsel, Bureau of Internal Revenue,*
*Attorney for Respondent.*

104 Before United States Board of Tax Appeals

[Title omitted.]

*Statement of Evidence*

Filed May 21, 1934

The following is a full and complete statement of all evidence material to the questions presented on review herein, which was submitted at the hearing of the above-entitled appeals before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals at Washington, D. C., on April 19, 1933.

* * * * * * *

The United States Ferro Alloys Corporation (hereinafter called Ferro Alloys) was incorporated under the laws of the State of New York in 1919. Before and during the transaction hereinvolved the corporation was capitalized at $3,000,000 divided into 30,000 fully paid shares of which each petitioner owned one-third.

On or about December 6, 1924, the petitioner, Parker Sloane, individually and as trustee for the other stockholders of
105 Ferro Alloys, entered into a written agreement with the Vanadium Corporation of America, a Delaware corporation hereinafter referred to as Vanadium.

The agreement states that Sloane, individually and as trustee, owned and controlled all of the outstanding stock of Ferro Alloys and was able to deliver to Vanadium all of the certificates of stock of subsidiary corporations owned by Ferro Alloys or in which it had an interest.

The agreement also states that the assets of Ferro Alloys consisted of about 30 acres of land at Niagara Falls, New York, with buildings, plant, machinery, equipment, and raw and finished supplies; also contracts covering delivery of electric power, patents, and all of the outstanding stock of Colonial Chrome Co., Ltd., which owned a mine and plant in Canada; and that the net worth of Ferro Alloys as of May 1, 1924, was $3,477,575.80, which includes the sum of $338,815.50 representing advances to Ferro Alloys of $298,815.50 on Chrome contracts and $40,000 for unused power.

The amounts of $298,815.50 and $40,000.00 were paid by Vanadium concurrently with the closing of the agreement and in accord with its terms, to Louise M. Higham and Niagara Falls Power Company. Vanadium thereby became a creditor on the books of Ferro Alloys to the extent of that $338,000.00.

The agreement also recites the obligations and liabilities of Ferro Alloys and it is stated that approximately $255,000.00 of the liabilities for materials delivered, labor, expenses and accruals is assumed by the Vanadium Co. and will be paid out of current
106 assets of Ferro Alloys. Among other recitals the agreement also contained the following:

"Whereas, said Parker Sloane is exchanging and delivering to and with the Vanadium Corporation of America Thirty Thousand (30,000) shares of the stock of the United States Ferro Alloys Corporation, organized under the laws of the State of New York, each of the par value of One Hundred Dollars ($100) and aggregating Three Million Dollars ($3,000,000.00) and being the total capital stock of said Corporation; and

"Whereas, the Vanadium Corporation of America is exchanging and delivering to said Parker Sloane, Trustee for the owners of said United States Ferro Alloys Corporation stock 66,666⅔ shares of the stock of the Vanadium Corporation of America each share being without par value, together with bonds of the United States Ferro Alloys Corporation, aggregating One Million, One Hundred Sixty-one Thousand One Hundred and Eighty-four Dollars and

50/100 ($1,161,184.50) secured by a Trust Mortgage on its land and plant at Niagara Falls and guaranteed as to payment of principal and interest by the said Vanadium Corporation of America, together with an assumption of the immediate payment by the Vanadium Corporation of America of certain due obligations as hereinafter set forth."

Article I of the agreement reads as follows:

"That the parties hereto do hereby fix the following as a
107 complete understanding and agreement as to the terms and conditions of said exchange. The said Parker Sloane shall or does hereby exchange, transfer, and deliver to the said Vanadium Corporation of America, all the issued and outstanding stock of the United States Ferro Alloys Corporation, comprising Thirty Thousand (30,000) shares, and will have the present Directors and Officers resign to the intent that the Vanadium Corporation of America may replace same at its discretion.

"Said exchange shall cover and entitle the party of the second part to all the assets of said United States Ferro Alloys Corporation as of December 23rd, 1924, including all the assets mentioned herein and all the shares of stock in any subsidiary or subsidiaries owned by said United States Ferro Alloys Corporation or in which the Corporation has an interest.

"The said Vanadium Corporation of America shall or does hereby exchange, transfer, and deliver to said Parker Sloane as aforesaid, 66,666⅔ shares of the stock of said Vanadium Corporation of America, each share being of no par value.

"The said Vanadium Corporation of America hereby causes to be issued and delivered to said Parker Sloane valid bonds to the amount of One Million, One Hundred Sixty-one Thousand One Hundred Eighty-four Dollars and Fifty Cents ($1,161,184.50) each for One Thousand ($1,000.00) Dollars, except one bond for One Hundred Eighty-four Dollars and Fifty Cents ($184.50), bear-
108 ing interest at 6% payable January 1st and July 1st of each year, and the said principal being payable as follows:

| | | |
|---|---|---|
| $161,184.50 | February | 1, 1925 |
| 150,000.00 | January | 1, 1926 |
| 150,000.00 | " | 1, 1927 |
| 150,000.00 | " | 1, 1928 |
| 150,000.00 | " | 1, 1929 |
| 150,000.00 | " | 1, 1930 |
| 150,000.00 | " | 1, 1931 |
| 100,000.00 | " | 1, 1932 |
| $1,161,184.50 | | |

said bonds to be secured by a Trust Mortgage or deed on the entire plant, property, and equipment of the United States Ferro Alloys Corporation at Niagara Falls, New York, and the payment of the principal and interest of said bonds to be duly and properly guaranteed by said Vanadium Corporation of America. Said mortgage and bonds shall provide that they are to have no voting power, and

shall be preferred over all present or future stock issues of said United States Ferro Alloys Corporation, and in dissolution, liquidation, merger, and distribution of dividends and assets. Besides the usual default clauses, there shall be provided a default clause to the effect that the Vanadium Corporation of America shall always have on hand for the use of the Niagara Falls Plant or in good faith contracted for in advance, at least sixty (60) days' supply of such materials and products as may be necessary and sufficient to
109 employ the power now under contract with the Niagara Falls Power Company, together with the usual provisions in a mortgage of this character, which shall be approved by said Parker Sloane or his Counsel representing him in this transaction, including an insurance clause, a clause to provide for the privilege of payment of part or all of the principal remaining due at any time on 90 days notice, and a clause to the effect that the machinery, equipment and buildings, and entire plant shall be kept in good order and repair, to the intent that there shall be no deterioration of the value or productive capacity of said plant, and that all taxes, water rates, assessments, and government charges shall be properly paid and discharged; said Trust Mortgage shall be deposited in escrow with Guaranty Trust Company. Said bonds shall further provide that in case the holder thereof desires to part with the possession of any of said bonds, they will first be offered to the party of the second part at par and accrued interest, and the party of the second part has the option to accept or reject said offer within ten days.

"The Vanadium Corporation of America further agrees that upon the receipt of the Thirty Thousand (30,000) shares of the United States Ferro Alloys Corporation stock aforesaid that it will immediately forthwith pay or cause to be paid in cash, Two Hundred Ninety-eight Thousand Eight Hundred and Fifteen Dollars and Fifty Cents ($298,815.50) as directed by Parker Sloane,
110 to the holders of certain obligations in the form of chrome contracts and representing moneys heretofore advanced to said United States Ferro Alloys Corporation, and upon the further production by said Parker Sloane or other person, of proper assignment or cancellation or under or by his direction of certain obligations amounting to Forty Thousand Dollars ($40,000.00) claimed to be due to the Niagara Falls Power Company by the said United States Ferro Alloys Corporation, that thereupon the Vanadium Corporation of America will forthwith immediately pay the said Parker Sloane or as directed by him said sum of Forty Thousand ($40,000.00) Dollars."

Pursuant to the terms of the contract the parties agreed that it should be fully performed and carried out at noon on December 19, 1924, at which time all the shares of Ferro Alloys, including all shares of its subsidiary corporation, duly endorsed and assigned to the party of the second part together with the resignation of the officers and directors of each corporation should be delivered to the

Vanadium Co. and that the Vanadium Co. should thereupon place 66,666⅔ shares of its stock in escrow with Guaranty Trust Co. and should duly deliver to Ferro Alloys the bonds hereinbefore described and immediately pay the amounts it had "assumed to pay" under the provisions of Article I of the agreement.

The agreement provides for a complete audit of the business, properties, and profits of Ferro Alloys, and the parties agreed that the escrow deposit with the Guaranty Trust Co. should be
111 dissolved on January 1, 1926, and that the exact number of shares of Vanadium Co. to be then delivered to Sloane for himself and the other parties entitled thereto should be determined on the basis of the earning power of Ferro Alloys demonstrated during 1925.

By a supplemental agreement dated December 18, 1924, entered into by the parties to the original agreement, the amount of its stock which the Vanadium Co. was to "exchange, transfer and deliver" to Sloane as trustee was reduced to 33,333⅓ shares.

The stock of Vanadium Co. was of no par value and for the purposes of the agreement its value was fixed at $30 per share.

The contract was duly executed in accordance with its terms, but as a result of the demonstrated earning power of Ferro Alloys during the year 1925, only 32,103 shares of the stock of the Vanadium Co. were delivered to Sloane for himself and the other persons entitled thereto upon the dissolution of the escrow with the Guaranty Trust Co.

Sloane was a member of the Executive Committee of Vanadium.

On July 2, 1928, a certificate of dissolution of Ferro Alloys was filed in the office of the Secretary of State of the State of New York.

Counsel for the parties at the hearing before the Board, stipulated that the petitioners did not receive taxable income or profit from the payment of the obligations of Ferro Alloys to Mrs. Higham and the Niagara Falls Power Company by Vanadium in the amount of $338,815.50; and that the only issue in these cases is whether
112 the transaction in which Vanadium acquired the stock of Ferro Alloys from its stockholders was a taxable transaction for them, they being the petitioners herein.

* * * * * * *

It is hereby stipulated and agreed that the above and foregoing statement of evidence (together with all Exhibits contained in the record) contains all the evidence introduced before the United States Board of Tax Appeals material to a consideration of the petitions to the Circuit Court of Appeals for a review of the decisions entered herein by the United States Board of Tax Appeals. It is further stipulated and agreed that said statement as made may be approved by the United States Board of Tax Appeals without further notice to any party hereto and that when approved said statement of evidence may be filed in the office of the Clerk and

become a part of the record for the purpose of the petitions for review herein.

(Signed) JAMES P. QUIGLEY,
JAMES P. QUIGLEY,
*Attorney of record for Parker Sloane and Hugh C. Sicard.*
(Signed) JOHN F. McCABE,
JOHN F. McCABE,
*Attorney of record for John J. Watts.*
ROBERT H. JACKSON,
*General Counsel, Bureau of Internal Revenue.*

Approved and ordered filed May 21, 1934.

(Signed) ERNEST H. VAN FOSSAN,
*Member of Board.*

113 *Petitioner's Exhibit No. 1*

This agreement, made by and between Parker Sloane, individually and as Trustee, residing at #8 East 62nd Street, New York City, as party of the first part, and Vanadium Corporation of America, a corporation organized under the laws of the State of Delaware, having its office at No. 120 Broadway, New York City, party of the second part.

Whereas, the said Parker Sloane, individually and as Trustee, owns and controls all the outstanding issued shares of the capital stock of United States Ferro Alloys Corporation, a corporation organized under the laws of New York State, and having its principal office at New York City, and states that he is able to deliver to the party of the second part all the certificates of stock duly endorsed, of the said Corporation representing the entire interest in the assets of said Corporation; and

Whereas, the said Parker Sloane states that he is able to deliver to the party of the second part all the shares of stock of all the subsidiary corporations owned by said United States Ferro Alloys Corporation or in which it has any interest; and

Whereas, the said Parker Sloane states and represents that the assets of the said United States Ferro Alloys Corporation consists of the following:

1. Upwards of thirty (30) acres of land more or less situated at Niagara Falls, New York, with the buildings, plant, machinery, equipment, and supplies, raw and finished, thereon and used in connection therewith.

114

2. A certain lease submitted herewith, dated October 18th, 1920, of certain silica or sandstone quarries situated at Lewiston, County of Niagara, State of New York, the said lease having been made by Mountainside Realty and Quarry Company to David Dick, Jr., and having been duly assigned by intermediate assignments to said United States Ferro Alloys Corporation; the term of said lease having commenced on June 1st, 1920, and ending on the 31st day

of May 1930; the yearly rental and tonnage charges being as specified in said lease and the assignment thereof; and the said party of the first part agreeing to make every effort (without covenant on his part) to effect a renewal of said lease for the further period of ten years, or until the 31st day of May 1940, or such other time as he may secure.

3. Contract between United States Ferro Alloys Corporation and The Niagara Falls Power Company, dated May 6th, 1919, covering the electrical power therein defined; expiring on the 31st day of December 1929, said contract, however, being subject to a renewal term of ten years or until the 31st day of December 1939, as shown on original contract submitted herewith.

4. Contract between United States Ferro Alloys Corpora-
115 tion and The Niagara Falls Power Company, dated the 1st day of December 1922, covering the electrical power therein defined; said contract expiring on the 1st day of January 1940, as shown on original contract submitted herewith.

5. Certain processes and patents more specifically described in Schedule A, hereto and made a part hereof.

6. A certain contract, dated the 14th day of June 1924, made by and between Colonial Chrome Company, Limited, and The African Chromite Corporation, Limited, of Johannesburg, South Africa, covering the supply of chrome ore; said contract expiring on the 31st day of December 1925, and being submitted herewith.

7. All outstanding and issued shares of the stock of the Colonial Chrome Company, Limited, owning a certain plant, real estate, lands, and mine at Black Lake in the Province of Quebec, Canada, said shares representing the entire ownership of the said plant and premises.

8. All the other contracts of said United States Ferro Alloys Corporation not herein specifically described; and

Whereas, the negotiations culminating in this agreement have been predicated upon the financial statement of the United States Ferro Alloys Corporation as of the 31st day of May 1924, set
116 forth on a statement form of the Federal Reserve Bank of New York, which statement shows a net worth of the corporation of $3,477,575.80 being the difference between the assets amounting to a total of $3,648,857.07 which includes property and equipment of Niagara Falls plant Lewiston Quarries, Black Lake mine and mill, patents, processes, etc., all of which are hereby accepted at values shown on Corporation's Books; and a total of liabilities amounting to $171,281.27; a photostatic copy of said statement is hereto annexed, is marked Exhibit "B" and is made a part hereof as if fully set forth herein; said net worth, however, includes the sum of $338,815.50, which represents advances on chrome contracts of $298,815.50 and $40,000 due for unused power, and which is being paid and cancelled as herein provided.

Whereas, the said Parker Sloane further states—

| | |
|---|---|
| That the net earnings of the said United States Ferro Alloys Corporation for the year 1923 as shown on their statement duly submitted or attached hereto amounted to | $141,453.32 |
| And as per statement, amortization of Patents was | 88,235.29 |
| And as per statement, Royalties on Patents were | 36,000.00 |
| And as per statement, interest paid | 17,646.67 |
| And as per statement, depreciations were | 70,347.52 |
| And as per statement, repairs were | 70,252.94 |
| That the total thereof is | $423,925.74 |

Whereas, said Parker Sloane states and represents that the
117 liabilities of the said United States Ferro Alloys Corporation on the 4th day of December 1924 amount approximately to not more than $255,000.00 for materials delivered, labor, expenses and accruals, etc., payment of which, in case this contract is closed and performed, is assumed by party of the second part and will be paid out of current assets of said United States Ferro Alloys Corporation, but exclusive of $338,815.50 which amount is being paid and satisfied as hereinafter provided; and also:

1. Current accounts at the plant at Niagara Falls are approximately provided for above.

2. Accounts payable on the part of the Colonial Chrome Company, Limited, amounting approximately to $500.00.

3. A certain suit brought by Electro Metallurgical Corporation against said United States Ferro Alloys Corporation which suit is pending in the United States District Court for the Southern District; or other possible infringement suits for the period up to the date hereof.

4. A certain action pending in the Courts of Cook County, Illinois, against said Corporation involving a total liability of not more than $6,000.00.

5. Any income tax which may be found due from said United States Ferro Alloys Corporation to the United States Government
or to the State of New York or to any other tax authority for
118 any income or other taxes due up to December 23rd, 1924; including also any tax or governmental charges which may be found due by said Colonial Chrome Company, Limited; and subject to said amounts being reduced by any like tax or charge found due against the Vanadium Corporation of America to the amount of one-seventh thereof.

Whereas, the party of the first part is willing and hereby agrees to deliver to the party of the second part a good and sufficient surety company bond in the form satisfactory to the party of the second part for such amount and such term as hereinafter set forth, to cover the said liabilities (not including said $255,000 and $338,815.50) and any other liquidated or contingent liabilities of the United States Ferro Alloys Corporation and of its subsidiary or subsidiaries existing on the 23rd day of December, 1924, payment of which is assumed by party of the first part.

Whereas, said Parker Sloane is exchanging and delivering to and with the Vanadium Corporation of America Thirty Thousand

(30,000) shares of the stock of the United States Ferro Alloys Corporation, organized under the laws of the State of New York, each of the par value of One Hundred Dollars ($100.00) and aggregating Three Million Dollars ($3,000,000.00) and being the total capital stock of said Corporation; and

Whereas, the Vanadium Corporation of America is exchanging and delivering to said Parker Sloane, Trustee for the owners of said United States Ferro Alloys Corporation stock, 66,666⅔
119 shares of the stock of the Vanadium Corporation of America, each share being without par value, together with bonds of the United States Ferro Alloys Corporation, aggregating One Million, One Hundred Sixty-one Thousand One Hundred and Eighty-four Dollars and 50/100 ($1,161,184.50) secured by a Trust Mortgage on its land and plant at Niagara Falls and guaranteed as to payment of principal and interest by the said Vanadium Corporation of America, together with an assumption of the immediate payment by the Vanadium Corporation of America of certain due obligations as hereinafter set forth.

Now, This Agreement Witnesseth:

That in consideration of One Dollar ($1.00) to each in hand paid and in consideration of the premises and other good and valuable consideration, the parties covenant and agree to and with each other as follows:

I

That the parties hereto do hereby fix the following as a complete understanding and agreement as to the terms and conditions of said exchange. The said Parker Sloane shall or does hereby exchange, transfer, and deliver to the said Vanadium Corporation of America, all the issued and outstanding stock of the United States Ferro Alloys Corporation, comprising Thirty Thousand (30,000) shares and will have the present Directors and Officers resign to the intent that the Vanadium Corporation of America may replace same at its discretion.

120 Said exchange shall cover and entitle the party of the second part to all the assets of the said United States Ferro Alloys Corporation as of December 23rd, 1924, including all the assets mentioned herein and all the shares of stock in any subsidiary or subsidiaries owned by said United States Ferro Alloys Corporation or in which the Corporation has an interest.

The said Vanadium Corporation of America shall or does hereby exchange, transfer, and deliver to said Parker Sloane as aforesaid, 66,666⅔ shares of the stock of said Vanadium Corporation of America, each share being of no par value.

The said Vanadium Corporation of America hereby causes to be issued and delivered to said Parker Sloane valid bonds to the amount of One Million One Hundred Sixty-one Thousand One hundred Eighty-four Dollars and Fifty Cents ($1,161,184.50) each for One Thousand ($1,000.00) Dollars except one bond for One hundred

Eighty-four Dollars and Fifty Cents ($184.50) bearing interest at 6% payable January 1st and July 1st of each year, and the said principal being payable as follows:

| | |
|---|---|
| $161,184.50 | February 1, 1925 |
| 150,000.00 | January 1, 1926 |
| 150,000.00 | " " 1927 |
| 150,000.00 | " " 1928 |
| 150,000.00 | " " 1929 |
| 150,000.00 | " " 1930 |
| 150,000.00 | " " 1931 |
| 150,000.00 | " " 1932 |
| 1,161,184.50 | |

121 said bonds to be secured by a Trust Mortgage or deed on the entire plant, property and equipment of the United States Ferro Alloys Corporation at Niagara Falls, New York, and the payment of the principal and interest of said bonds to be duly and properly guaranteed by said Vanadium Corporation of America. Said mortgage and bonds shall provide that they are to have no voting power, and shall be preferred over all present or future stock issues of said United States Ferro Alloys Corporation, and in dissolution, liquidation, merger and distribution of dividends and assets. Besides the usual default clauses, there shall be provided a default clause to the effect that the Vanadium Corporation of America shall always have on hand for the use of the Niagara Falls Plant or in good faith contracted for in advance, at least sixty (60) days' supply of such materials and products as may be necessary and sufficient to employ the power now under contract with The Niagara Falls Power Company, together with the usual provisions in a mortgage of this character, which shall be approved by said Parker Sloane or his Counsel representing him in this transaction, including an insurance clause, a clause to provide for the privilege of payment of part or all of the principal remaining at any time on 90 days' notice, and a clause to the effect that the machinery, equipment and buildings, and entire plant shall be kept in good order and repair, to the intent that there shall be no deterioration of the value or productive capacity of said plant, and that all taxes, water rates, assessments and government charges shall be properly paid and discharged; said Trust Mortgage shall
122 be deposited in escrow with Guaranty Trust Company. Said bonds shall further provide that in case the holder thereof desires to part with the possession of any of said bonds, they will first be offered to the party of the second part at par and accrued interest and the party of the second part has the option to accept or reject said offer within ten days.

The Vanadium Corporation of America further agrees that upon the receipt of the Thirty Thousand (30,000) shares of the United States Ferro Alloys Corporation stock aforesaid that it will immediately forthwith pay or cause to be paid in cash, Two Hundred Ninety-eight Thousand Eight Hundred and Fifteen Dollars and

Fifty Cents ($298,815.50) as directed by Parker Sloane, to the holders of certain obligations in the form of chrome contracts and representing moneys heretofore advanced to said United States Ferro Alloys Corporation, and upon the further production by said Parker Sloane or other person, of proper assignment or cancellation or under or by his direction of certain obligations amounting to Forty Thousand Dollars ($40,000.00) claimed to be due to the Niagara Falls Power Company by the said United United States Ferro Alloys Corporation, that thereupon the Vanadium Corporation of America will forthwith immediately pay the said Parker Sloane or as directed by him said sum of Forty Thousand Dollars ($40,000.00).

II

The parties hereto agree that this contract shall be carried out and fully performed at the office of the party of the second part, 120 Broadway, New York City, on the 23rd day of December, 1924, at 12 noon, at which time and place, all shares of United States Ferro Alloys Corporation including all shares of the subsidiary corporation, duly endorsed and assigned to the party of the second part, together with the resignations of the officers and directors of said Corporations, shall be duly delivered to the party of the second part by said party of the first part; and the party of the second part shall place in escrow with the Guaranty Trust Company as herein provided, 66,666⅔ shares of the Vanadium Corporation and duly deliver to the party of the first part the bonds, and deposit the Trust Mortgage in escrow as herein set forth, and at the same time and place immediately pay in cash, to the persons designated and in manner provided by said Parker Sloane, the amounts that said party of the second part therein assumed to pay, and each party shall fulfil and perform in good faith all the conditions and provisions of this contract.

123

The parties hereto further agree that said exchange as above set forth when completed shall be a final and completed transaction in all respects and that as provided herein, to wit: on January 1st, 1926, the said 66,666⅔ shares of the Vanadium Corporation of America stock, placed in escrow as aforesaid, less any deduction for profits of 1925 as herein set forth, shall be absolutely forthwith immediately then delivered on said date to the party of the first part, and the party of the second part hereby covenants and agrees that it will not take any action or make any claim or demand that may arise from any matter connected with this exchange or otherwise, that could or might in any manner prevent or postpone the said delivery of said stock upon said date and does further agree and covenant to take any and all action that may be necessary on its part to have the said Guaranty Trust Co. deliver said stock to the party of the first part on said January 1st, 1926, as aforesaid.

124

Provided, however, that the carrying out and closing of said contract as above set forth shall be subject to the following provisions, viz:

The statement of the United States Ferro Alloys Corporation for the year 1923, herewith sumbitted, as prepared by the Brooks Audit Company of 74 Wall Street, New York City, among other things, makes findings, as follows, viz:

| | |
|---|---|
| Net earnings for the year 1923 | $141,453.32 |
| Amortization of Patents | 88,235.29 |
| Royalties on Patents | 36,000.00 |
| Interest Payments | 17,646.67 |
| Depreciation | 70,347.52 |
| Repairs | 70,242.94 |
| Total | $423,925.74 |

and for the purpose of verification, by an examination made in good faith, party of the first part agrees that the party of the second part, at its own expense, by its Auditors, Touche, Nieven & Company of 80 Maiden Lane, New York City, shall immediately make an audit of said 1923 statement as to said findings under the following conditions: (the party of the first part agreeing that the United States Ferro Alloys Corporation will afford said
125 Touche, Nieven & Company the fullest facility and opportunity to examine the books, papers, and accounts thereof and will cooperate in all respects by its officers and auditors in said examination).

1. The party of the second part shall immediately place in escrow with the Guaranty Trust Company of 140 Broadway, New York City, ten thousand shares (10,000) of stock of the Vanadium Corporation of America to be disposed of as hereinafter provided.

2. That Touche, Nieven & Company shall immediately make said audit and complete and report on same within ten days, and if said Touche, Nieven & Company or a third auditor appointed as hereinafter described, approves said findings of said statement of 1923 as approximately correct, then said ten thousand (10,000) shares of Vanadium Corporation stock are to be delivered by said Guaranty Trust Company to the party of the first part, as a credit on the 66,666⅔ shares of like stock hereinbefore referred to, at the time and place set in this contract for delivery thereof, and if the contract is fully carried out by said parties, then said ten thousand shares are to be placed in escrow as part of said 66,666⅔ shares.

3. If said Touche, Nieven & Company substantially disapproves as incorrect all or any part of said findings of 1923 statement as above set forth, then said findings of said statement of 1923 shall be immediately reaudited by a third auditor, forthwith appointed jointly by both parties hereto at the joint expense and under the
126 joint instructions of both parties whose decision as to findings shall be final in all respects.

4. If said third auditor substantially disapproves as incorrect all or any part of the findings of the Brooks Audit Company, then the

Guaranty Trust Company shall forthwith without further notice, return said ten thousand (10,000) shares of stock to the party of the second part.

5. Upon said return as provided in paragraph 4, all obligations of either or both of said parties herein to further perform or continue this agreement are hereby waived, terminated and cancelled, without any claim, cost or expense as to either party against the other.

If said findings of said 1923 statement are approved, then said contract is to be performed and carried out in all respects as above set forth, Provided Further that at least ten (10) days before the time set for closing herein, the party of the first part shall produce the following documents and papers as hereinafter set forth, viz:

1. An abstract of title with searches made by the Niagara Guarantee Search Company of Lockport, New York, together with a certificate of title made by Cohn, Chormann & Franchot, Attorneys of Niagara Falls, New York, shall be produced and delivered to the party of the second part or his attorney, showing the absolute ownership in fee simple by the United States Ferro Alloys Corporation free and clear of all encumbrances of certain real estate com-
127 prising thirty (30) acres more or less upon which are erected buildings and plant, machinery, materials and supplies, raw and finished, situate at Niagara Falls, New York, used in connection with said plant and the deeds of which have been duly submitted or attached hereto; and the party of the first part hereby warrants that the United States Ferro Alloys Corporation owns said property as aforesaid.

2. The submission to the party of the second part or its counsel of all the proceedings conducted by the firm of Galipeaut, St. Laurant, Metayer, Gagne & Devlin, attorneys of the City of Quebec, which resulted in the ownership by the United States Ferro Alloys Corporation or of their subsidiary in and to the mining properties situate at Black Lake, Province of Quebec in compliance with and in such manner as are provided by the mining laws of the Province of Quebec, or Dominion of Canada, and upon which is erected a chrome concentrating plant, and that the same are free and clear from all encumbrances.

3. A surety bond for the amount of $200,000 to run for one year; and for three years thereafter, for such reduced or such increased amount, which latter increase shall not exceed 50% of the aforesaid sum, as party of the second part elects, shall be given to the party of the second part executed by a good and sufficient surety company in form satisfactory to the party of the second part to cover the said liabilities of the United States Ferro Alloys Corporation above men-
tioned (excepting said liabilities of $255,000, referred to on
128 page 4 herein, payment of which in case this contract is closed and performed is assumed by the party of the second part and will be paid out of current assets of said United States Ferro Alloys Corporation, and excepting said liabilities of

$338,815.50 payment of which is assumed and paid in cash by party of the second part as set forth herein) and any other liquidated or contingent liabilities of said corporation and of its subsidiary or subsidiaries existing on the 23rd day of December, 1924, payment of which liabilities with the exception of said excepted liabilities is assumed by party of the first part.

4. Satisfactory proof showing that the electrical contracts of the said United States Ferro Alloys Corporation with The Niagara Falls Power Company entitle and will for the period of the contracts entitle the said corporation to electric current sufficient to enable said corporation to produce a minimum total of 21,000 tons of Ferro Silicon, Ferro Chrome and Silico manganese annually.

5. Satisfactory proof that the financial condition of the United States Ferro Alloys Corporation on the 4th day of December, 1924, was substantially as satisfactory from the standpoint of net worth as its financial condition shown in Exhibit B (and as expressed on page 3) which is hereto annexed, subject to the usual interim depreciation, obsolescence and amortization, and the party of the first part agrees that there shall be no material change in the financial condition of the United States Ferro Alloys Corporation between said date and date of closing.

129 IV

It is Further Provided that all of the stock of the Vanadium Corporation of America, to wit, 66,666⅔ shares, each share being without part value, shall be placed in escrow in the Guaranty Trust Company of New York, 140 Broadway, Borough of Manhattan, City of New York, for the period of one year from December 31, 1924. If the net earnings of the United States Ferro Alloys Corporation for the year 1925 (such net earnings to be fixed by computing the ratio that the total cost of manufacture of this Corporation's products for the year 1923 bears to a contemplated profit of $322,000.00 to the intent that said ratio shall be applied to the cost of manufacture for the year 1925 to determine the profits therein made, should said ratio cost of manufacture be exceeded in 1925, except that there shall be added to the cost of manufacture any bona fide increase in cost entering into the raw materials or power necessary to manufacture the 1925 products), as determined by an accountant selected by the party of the first part and an accountant selected by the party of the second part, and, in case of disagreement, as determined by a third accountant selected by both the party of the first and second parts whose decision shall be final, do not amount to a minimum of $400,000.00 for said year 1925, then the amount of stock of Vanadium Corporation of America so placed in escrow as aforesaid, shall be reduced by an amount equalling the difference between the amount earned as above determined and the said
130 minimum earnings of $400,000.00, and sufficient shares at the

rate of Thirty Dollars ($30.00) per share shall belong to and be taken by and delivered to said Vanadium Corporation of America as and for its property and the balance of said stock so placed in escrow shall thereupon be forthwith delivered by the Guaranty Trust Company to the party of the first part.

V

The party of the first part further undertakes to transfer and deliver to the party of the second part good and sufficient assignments assigning to the party of the second part or to its assignee, as the party of the second part may designate, any and all patents, letters patent or applications for letters patent owned by the United States Ferro Alloys Corporation or in which it has any interest and will cause to be assigned to the party of the second part or to its designated assignee any future developments over which he has control of the same subject matter or of any continuation or divisional application of the same.

The party of the first part in consideration of the exchange of the said stock, further agrees freely to give as a Director and member of Executive Committee of party of the second part, his best services and efforts to and for the benefit of said party of the second part and of the said United States Ferro Alloys Corporation.

The party of the second part hereby gives the party of the first part, at the time of closing this contract, the right and option of receiving the delivery of ten thousand (10,000) shares of said
131 total of 66,666⅔ shares of Vanadium Corporation of America stock, free from the necessity of depositing same in escrow with the Guaranty Trust Company, as herein set forth, PROVIDED that said ten thousand (10,000) shares of said stock shall be forthwith deposited by the party of the first part with the Surety Company, giving the bond contemplated herein as collateral security thereto, for a period of at least one year from January 1st, 1925.

It is expressly understood and agreed that the fact that the party of the first part is acting as Trustee as well as individually does not impose any obligation on the party of the second part to inquire concerning the terms of said Trust and does not obligate the party of the second part to recognize any one other than the Trustee or to have any duty with respect to the application of any trust property by the Trustee.

This agreement shall bind the successors, administrators, executors and assigns of the parties hereto.

In Witness Whereof, the said party of the first part has hereunto duly set his hand and seal and the said party of the second part has duly executed this instrument by its proper officer and has hereunto affixed its corporate seal on the 6th day of December, 1924.

[SEAL] PARKER SLOANE [L. S.]

VANADIUM CORPORATION OF AMERICA,

By A. A. COREY, JR.

132 *Petitioner's Exhibit No. 2*

This Agreement, made by and between Parker Sloane, individually and as Trustee, residing at 8 East 62nd Street, New York City, as party of the first part, and Vanadium Corporation of America, a corporation organized under the laws of the State of Delaware, having its office at No. 120 Broadway, New York City, party of the second part:

Witnesseth:

The parties hereto in consideration of One Dollar ($1.00) and for other good and valuable consideration, the receipt whereof is hereby acknowledged, hereby covenant and agree as follows:

The agreement between the parties dated December 6th, 1924, is hereby modified and amended as follows:

1. Instead of 66,666⅔ shares of the stock of the Vanadium Corporation of America mentioned in said agreement, the Vanadium Corporation of America will on the day of closing exchange, transfer and deliver to Parker Sloane, as trustee, and in the manner in said agreement provided, 33,333⅓ shares of said stock of the Vanadium Corporation of America. The 10,000 shares of said stock heretofore on December 9th, 1924, delivered to the Guaranty Trust Company in escrow, shall be deemed a part of said total of 33,333⅓ shares of said stock.

2. In said agreement dated December 6th, 1924, any and all
133 references to 66,666⅔ shares of said stock of the Vanadium Corporation of American are hereby changed to 33,333⅓ shares of said stock, and 33,333⅓ shares shall be substituted and deemed inserted in place of said 66,666⅔ shares wherever the latter figure is used in said agreement.

3. The words "all of which are hereby accepted at values shown on Corporation's books" on page 3 of said agreement, shall be and are hereby deemed stricken from said agreement dated December 6th, 1924.

4. With reference to Article III on pages 10, 10a, 11, 12, 13, and 14 of said agreement of December 6th, 1924:

(a) The Auditors, Touche, Niven & Company have reported, but no third auditor shall be appointed, and no reauditing of the statement for 1923 by a third auditor shall be required;

(b) The party of the first part may produce the complete papers referred to in Subdivision 2 of said Article II on pages 12 and 13 of said agreement at any time prior to the closing; and

(c) The surety bond referred to in Subdivision 3 of said Article II on page 13 of said agreement may be produced and delivered to the party of the second part on the day of closing; and

(d) Subdivision 5 of said Article II on page 14 of said agreement is stricken out.

134 5. Article IV on pages 14 and 15 of said agreement is stricken out.

6. If the difference between the current assets and current liabilities of the United States Ferro Alloys Corporation on the day of closing amounts to less than Six Hundred and Fifty Thousand Dollars ($650,000.00), such difference shall be made up and allowed by the party of the first part to the party of the second part out of the stock of the Vanadium Corporation of America held in escrow by the Guaranty Trust Company at the rate of Thirty Dollars ($30.00) per share. The party of the second part shall notify the party of the first part on or before June 1st, 1925, whether said difference between current assets and current liabilities on the day of closing was more or less than Six Hundred Fifty Thousand Dollars ($650,000.00). If less than Six Hundred and Fifty Thousand Dollars ($650,000.00) the party of the second part shall set forth the amount of said difference in an affidavit sworn to by an officer of the party of the second part, and this affidavit shall be conclusive.

7. If the net earnings of the United States Ferro Alloys Corporation for the year 1925 amount to more than $300,000.00, the party of the second part will pay to the party of the first part five (5) times the difference between such net earnings and said sum of $300,000.00; provided, however, that the maximum of such
135 payment shall not exceed $500,000.00. For the purpose of determining said net earnings for the year 1925, the certified statement or report of one of the following firms of certified public accountants shall be conclusive.

Arthur Young & Co., 82 Beaver St., New York City,
Marwick, Mitchell & Co., 42 Exchange Place, New York City, or
Haskins and Sells, 30 Broad St., New York City.

8. As hereby modified, said agreement of December 6th, 1924, shall be performed at the time and place stated in said agreement or at such earlier date as may be agreed on by the parties.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused this instrument to be executed by its duly authorized officer, and its corporate seal to be hereunto affixed, this 18th day of December 1924.

PARKER SLOANE,
*Individually and as Trustee.*

[SEAL] VANADIUM CORPORATION OF AMERICA,
By A. A. COREY, JR.,
*President.*

136 STATE OF NEW YORK,
*County of New York, ss:*

On this 18th day of December 1924, before me personally appeared Parker Sloane, to me known and known to me to be one of the persons described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

JENNIE C. DALE.

STATE OF NEW YORK,
*County of New York, ss:*

On this 18th day of December 1924, before me personally came Alfred A. Corey, Jr., to me known, who being by me duly sworn, did depose and says that he resides in New York City; that he is the President of the Vanadium Corporation of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

[SEAL] JENNIE C. DALE.

137 STATE OF NEW YORK,
*County of New York, City of New York, ss:*

On this 9th day of December, in the year nineteen hundred and twenty-four, before me came Parker Sloane, to me known and known to me to be the individual described in and who executed the within instrument, and he duly acknowledged that he executed the same.

[SEAL] JENNIE C. DALE.

[STAMP]

3/30/25

STATE OF NEW YORK,
*County of New York, City of New York, ss:*

On this 9th day of December, in the year one thousand nine hundred and twenty-four, before me personally came A. A. Corey, Jr., to me known and known to me, who being by me duly sworn, did depose and say that he resides in New York City; that he is the President of the Vanadium Corporation of America, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL] JENNIE C. DALE.

[STAMP]

3/30/25

138 *Petitioner's Exhibit No. 3*

Certificate of Incorporation of the United States Ferro Alloys Corporation

*City, County, and State of New York, ss:*

We, the undersigned, all of whom are of full age and citizens of the United States and residents of the State of New York, do by these presents associate ourselves to form a corporation pursuant to

and in conformity with the provisions of the Business Corporations Law, and for that purpose we do hereby certify as follows:

I. The name of the proposed corporation is the United States Ferro Alloys Corporation.

II. The purposes for which it is to be formed are to manufacture alloys and other materials and products and make purchases and sales of the same; the buying, acquiring, selling, improving, holding, transferring, exchanging, leasing, renting, and mortgaging of real property; the building, construction, selling, and alteration of buildings thereon; the making, purchasing, and selling of materials for all kinds of manufacturing and for the construction of buildings or the improvement of real estate; the acquiring, buying, holding, transferring, and selling of bonds and mortgages; the loaning of money on real estate or other property; the construction, erection, buying, selling, acquiring, leasing, improving, holding, transferring, exchanging, renting, and mortgaging factory buildings and structures
139 appertaining thereto, including power for manufacturing and business purposes, and also the equipment, machinery, and apparatus connected therewith, or necessary for manufacturing and business purposes; the acting as broker, agent, and attorney in fact for the purchase, sale, and exchange of all kinds of property for the owners thereof; and the conducting for said owners of all transactions relating to said property; and to manage and develop real and personal property; and to carry on any of the above business.

III. The amount of the capital stock shall be $500,000, divided into shares of one hundred dollars each.

IV. The number of shares of which said stock shall consist is five thousand, each of which shall be of the amount of one hundred dollars, and the amount of capital with which said corporation shall commence business is Five thousand Dollars.

V. The principal business office shall be located in the Borough of Manhattan, County of New York, City of New York.

VI. Its duration shall be one hundred years.

VII. The number of Directors shall be three.

VIII. The names and post office addresses of the Directors for the first year are as follows:

Walter Brower, 60 Beaver Street, New York City.
Julius Siegelman, 915 St. Marks Avenue, New York City.
John W. Fraser, Garden City, New York.

140 IX. The names and post office addresses of the subscribers and the amount of shares which each agrees to take in said corporation, are as follows:

Walter Brower, 60 Beaver St., New York City, 200 shares.
Julius Siegelman, 915 St. Marks Ave., N. Y. City, 200 shares.
John W. Fraser, Garden City, New York, 200 shares.

X. The directors need not be stockholders of the corporation.

STATE OF NEW YORK,
*Department of State, ss:*

I Certify That I have compared the preceding copy with the original Certificate of Incorporation of United States Ferro Alloys Corporation, filed in this department on the 22nd day of January 1919, and that such copy is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State at the City of Albany, this twenty-third day of February, one thousand nine hundred and thirty-two.

[SEAL] FRANK S. SHARP,
*Deputy Secretary of State.*

141 In Witness Whereof, we have made, signed, acknowledged, and accepted this certificate in duplicate, this 20th day of January 1919.

WALTER BROWER.
JULIUS SIEGELMAN.

*City, County, and State of New York, ss:*

On this 20th day of January, in the year One thousand nine hundred and nineteen, before me personally came Walter Brower, Julius Siegelman, and John W. Fraser, to me known, and known to me to be the individuals described in and who executed the foregoing certificate, and they severally duly acknowledged to me that they executed the same.

[SEAL] B. F. GOETSCHIUS,
*Commissioner of Deeds, City of New York.*

New York County, Clerk's No. 323.
My term expires November 20, 1919.

142 Book 703, Page 836

Certificate of Incorporation of the United States Ferro Alloys Corporation (by consent).

Tax for privilege of organization of this Corporation, 250—Under Section 180, Chapter 62, Laws of 1909, as Amended; Paid to State Treasurer before Filing.

STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE.

Filed and recorded Jan. 22, 1919.

FRANCIS G. H. HUGO,
*Secretary of State.*
JULIUS SIEGELMAN,
*887 Manhattan Ave., Brooklyn.*

143 *Petitioner's Exhibit No. 4*

No. 53395, Series B

STATE OF NEW YORK,
COUNTY OF NEW YORK,
*City of New York, ss:*

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, Do Hereby Certify That said Court is a Court of Record, having by law a seal, that B. F. Goetschius, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the same a Commissioner of Deeds in and for said city and county, duly commissioned and sworn, and qualified to act as such; that as such Commissioner of Deeds he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to take affidavits and certify the acknowledgment and proof of deeds and other written instruments to be read in evidence or recorded in this state; and further that I am well acquainted with the handwriting of such Commissioner of Deeds and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 23rd day of October, 1919.

[SEAL] WM. F. SCHNEIDER,
*Clerk.*

144 The undersigned, Stockholder of record of the United States Ferro Alloys Corporation, a stock corporation organized under the laws of the State of New York, owning the entire capital stock of said corporation issued and outstanding, hereby consents that the capital stock of the said corporation be increased from Five Hundred Thousand ($500,000.00) Dollars, consisting of five thousand (5000) shares of the par value of One Hundred ($100.00) Dollars each, to the amount of Three Million ($3,000,000.00) Dollars, to consist of Thirty thousand (30,000) shares of the same par value.

PARKER SLOANE.

Dated October 21, 1919.

Name of stockholder, Parker Sloane. Number of shares, 600.

CITY AND STATE OF NEW YORK,
*County of New York:*

On this 21st day of October, 1919, before me personally came Parker Sloane, to me known, and known to me to be the individual described in and who executed the foregoing instrument and did acknowledge to me that he executed the same.

B. F. GOETSCHIUS,
*Commissioner of Deeds, City of New York.*

Term expires November 20, 1919.

STATE OF NEW YORK,
*Department of State, ss:*

I Certify That I have compared the preceding copy with the
145 original Certificate to Increase the Capital Stock of United States Ferro Alloys Corporation, filed in this department on the 29th day of October, 1919, and that such copy is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State, at the City of Albany, this twenty-third day of February, one thousand nine hundred and thirty-two.

[SEAL] FRANK S. SHARP,
*Deputy Secretary of State.*

CITY AND STATE OF NEW YORK,
*County of New York:*

John W. Fraser, being duly sworn, deposes and says that he is Secretary and Treasurer of the United States Ferro Alloys Corporation. That he is the custodian of the stock book of said corporation, and that Parker Sloane, the person who has signed the foregoing consent in person, is the sole holder of record of the entire capital stock of said corporation issued and outstanding. That only Sixty Thousand ($60,000.00) Dollars of the original Five Hundred Thousand ($500,000.00) Dollars capital stock has been issued.

JOHN W. FRASER.

Sworn to before me this 21st day of October, 1919.

[SEAL] B. F. GOETSCHIUS,
*Commissioner of Deeds, City of New York.*

Term expires November 20, 1919.

146 Book —, Page —

United States Ferro Alloys Corporation, Increase of Capital Stock.

Tax for privilege of increase of capital of this Corporation, $1,250—Under Section 180, Chapter 62, Laws of 1909 As Amended; Paid to State Treasurer before Filing.

STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE.

Filed and recorded Oct. 29, 1919.

FRANCIS G. H. HUGO,
*Secretary of State.*

CHARLES LOUIS SICARD,
*Attorney, 30 East 42nd Street, New York City, N. Y.*

147 *Petitioner's Exhibit No. 5*

STATE OF NEW YORK,
*County of New York, ss:*

We, the undersigned, a majority of the directors of the United States Ferro Alloys Corporation, do hereby certify:

That the capital stock of said Company is Three Million ($3,000,000) Dollars and that more than one-half thereof, to wit: all or Three Million ($3,000,000) Dollars has been paid in, and that the same was issued for cash and property.

That said payment of one half or all of said capital stock was made within one year from the incorporation of said Company and within thirty days preceding the date of the execution and acknowledgment of this certificate.

In Witness Whereof we have executed this certificate this seventh day of November, 1919.

PARKER SLOANE.
HUGH C. SICARD.

No. 17915, Series B.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
*City of New York, ss:*

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, Do Hereby Certify, That said Court is a Court of Record, having by law a seal; that B. F. Goetschius, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the same a Commissioner of Deeds in and for said city and county, duly commissioned and sworn, and qualified to act as

148 such; that as such Commissioner of Deeds he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to take affidavits, and certify the acknowledgment and proof of deeds and other written instruments to be read in evidence or recorded in this state; and further that I am well acquainted with the handwriting of such Commissioner of Deeds and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 5th day of June, 1920.

[SEAL.]

WM. F. SCHNEIDER,
*Clerk.*

STATE OF NEW YORK,
COUNTY OF NEW YORK,
*City of New York, ss:*

On this seventh day of November, in the year nineteen hundred and nineteen, before me came Parker Sloane and Hugh C. Sicard to

me known, and known to me to be the individuals described in, and who executed the within instrument and they severally duly acknowledged that they executed the same.

B. F. GOETSCHIUS,
*Commissioner of Deeds, City of New York,*

Kings County Clerk's Number 282a; Kings County Register's Number 9056; New York County Clerk's Number 323; New York County Register's Number 19122.

Term expires November 20, 1919.

149 STATE OF NEW YORK,
*Department of State, ss:*

I Certify That I have compared the preceding copy with the original Certificate of Payment of Capital Stock of United States Ferro Alloys Corporation, filed in this department on the 23rd day of June 1920, and that such copy is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State at the City of Albany, this twenty-third day of February, one thousand nine hundred and thirty-two.

[SEAL] FRANK S. SHARP,
*Deputy Secretary of State.*

STATE OF NEW YORK,
*County of New York, ss:*

Parker Sloane and Hugh C. Sicard being respectively duly sworn, depose and say that he, the said Parker Sloane, is the President of the United States Ferro Alloys Corporation, and that he, the said Hugh C. Sicard is the Secretary thereof, and that the above certificate is true.

PARKER SLOANE.
HUGH C. SICARD.

Sworn to before me this 7th day of November 1919.

B. F. GOETSCHIUS,
*Commissioner of Deed, City of New York.*

150 Book —, Page —

U. S. Ferro Alloys Corporation; Certificate of Payment of Capital Stock.

STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE.

Filed and recorded Jun. 23, 1920.

FRANCIS G. H. HUGO,
*Secretary of State.*

CHARLES LOUIS SICARD,
*Counsel,*
*30 East 42nd St., New York.*

151 *Petitioner's Exhibit No. 6*

## Certificate of Dissolution of United States Ferro Alloys Corporation

Pursuant to Article Ten of the Stock Corporation Law:

We, the undersigned, constituting the stockholders of record of all the outstanding shares of United States Ferro Alloys Corporation entitled to vote on the dissolution thereof, do hereby, pursuant to Section 105 of the Stock Corporation Law, certify as follows:

1. The name of the corporation is United States Ferro Alloys Corporation.

2. The Certificate of Incorporation of said corporation was filed in the office of the Secretary of State on the 22nd day of January 1919, and a certified copy of the Certificate of Incorporation was filed in the office of the County Clerk of New York County on the 24th day of January 1919.

3. The said corporation elects to dissolve.

4. The names and post-office addresses of its directors are as follows:

| Names | Post-Office Addresses |
|---|---|
| Alfred A. Corey, Jr | 120 Broadway, New York City. |
| Beram D. Saklatwalla | Bridgeville, Pa. |
| Edgar R. Alpaugh | Morris Plains, N. J. |
| Gustav Laub | Sound Beach, Conn. |

152 5. The names, titles, and post-office addresses of the officers of the corporation are:

| Names | Titles | Post-Office Addresses |
|---|---|---|
| Alfred A. Corey, Jr | President | 120 Broadway, N. Y. C. |
| Beram D. Saklatwalla | Vice President | Bridgeville, Pa. |
| Edgar R. Alpaugh | Secretary & Treasurer | Morris Plains, N. J. |
| Gustav Laub | Assistant Sec'y | Sound Beach, Conn. |

In Witness Whereof, we have made, subscribed, and acknowledged this certificate in duplicate this 21st day of September 1927.

ALFRED A. COREY, JR.
BERAM D. SAKLATWALLA.
EDGAR R. ALPAUGH.
GUSTAV LAUB.

Jul. 2, 1928.

The State Tax Commission hereby consents to the filing of the annexed certificate of dissolution of United States Ferro Alloys Corporation.

STATE TAX COMMISSION,
By N. W. CANFIELD,
*Deputy.*
G.

STATE OF NEW YORK,
*Department of State, ss:*

I Certify That I have compared the preceding copy with the original Certificate of Dissolution of United States Ferro
152 Alloys Corporation, filed in this department on the 2nd day of July 1928, and that such copy is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State at the City of Albany, this twenty-third day of February, one thousand nine hundred and thirty-two.

[SEAL] FRANK S. SHARP,
*Deputy Secretary of State.*

STATE OF NEW YORK,
*County of New York, ss:*

On this 21st day of September 1927, before me personally came Alfred A. Corey, Jr., Beram D. Saklatwalla, Edgar R. Alpaugh and Gustav Laub, to me known and known to me to be the persons described in, who executed the foregoing certificate and severally duly acknowledged to me that they executed the same.

[SEAL] A. DELAFIELD SMITH,
*Notary Public, N. Y. County.*

New York County Register No. 9086; New York Co. Clerk's No. 377.

Commission expires March 30, 1929.

154 STATE OF NEW YORK,
*County of New York, ss:*

Alfred A. Corey, Jr., and Edgar R. Alpaugh, being severally duly sworn, do depose and say, and each for himself deposes and says that he, the said Alfred A. Corey, Jr., is the President of the United States Ferro Alloys Corporation, and he, the said Edgar R. Alpaugh, is the Secretary thereof; that the persons who have subscribed the foregoing certificate in person or by proxy constitute the holders of record of all of the outstanding shares of the above-named corporation entitled to vote on dissolution.

ALFRED A. COREY, JR.,
*President.*

EDGAR R. ALPAUGH,
*Secretary.*

Sworn to before me this 21st day of September 1927.

[SEAL] A. DELAFIELD SMITH,
*Notary Public, N. Y. County.*

New York County Register's No. 9086; New York Co. Clerk's No. 377.

Commission expires March 30, 1929.

155 3331 29

Certificate of Dissolution of United States Ferro Alloys Corporation.

STATE OF NEW YORK,
DEPARTMENT OF STATE.

Filed Jul. 2, 1928. Tax, None. Filing Fee, 115.

ROBERT MOSES,
*Secretary of State.*

By ——— ———,
*Cashier.*

MARTIN A. PHILLIPS,
*1 Madison Ave., N. Y. City.*

156 *Petitioner's Exhibit No. 7*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
*Washington, Apr. 20, 1926.*

Address reply to Commissioner of Internal Revenue and Refer to—

IT:CR:E.
EFC.

UNITED STATES FERRO ALLOYS CORPORATION,
c/o Lawrence P. Mattingly,
*120 Broadway, New York, N. Y.*

SIRS: An examination of your income-tax returns for 1922, 1923, and 1924, in connection with a Revenue Agent's report dated March 24, 1925, discloses an aggregate deficiency of $43,363.08, as outlined on the attached statement and accompanying schedules.

It is observed that you have signed an agreement consenting to the assessment of the deficiency of $43,363.08. Therefore, the assessment of the above-stated amount will be entered on the next list; but payment should not be made until you have received notice
157 and demand from the Collector of Internal Revenue for your district, and payment should then be made to him.

Respectfully,

D. H. BLAIR,
*Commissioner.*

By C. R. NASH,
*Assistant to the Commissioner.*

Enclosures.
Statement.
Schedules 1, 2, and 3.
Form 882.

IT:CR:E.
EFC.

STATEMENT OF RETURNS EXAMINED AND RESULTING TAX LIABILITY

*Returns examined*

Company—United States Ferro Alloys Corporation, New York, N. Y.:

| Year: | Form |
|---|---|
| 1922 | 1120 |
| 1923 | 1120 |
| 1924 | 1120 |

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*Tax liability*

Company—United States Ferro Alloys Corporation, New York, N. Y.:

| Year: | Tax due |
|---|---|
| 1922 | $18,211.19 |
| 1923 | 18,364.09 |
| 1924 | 6,787.80 |
| Total deficiency | $43,363.08 |

Revenue Agent's report dated March 24, 1925, a copy of which has been furnished you, has been accepted as submitted.

UNITED STATES FERRO ALLOYS CORPORATION

Year ended December 31, 1922

SCHEDULE 1

Computation of Tax, 1922 Rates—Excess Profits Tax.

*Income tax*

| | |
|---|---|
| Net income taxable year, as shown in agent's report dated March 24, 1925 | $145,689.52 |
| Less: | |
| Taxable at 12½% | 145,689.52 |
| Income Tax | 18,211.19 |
| Previously assessed | None. |
| Tax to be assessed | 18,211.19 |

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Year ended December 31, 1923

SCHEDULE 2

Computation of Tax, 1923 Rates—Excess Profits Tax.

*Income tax*

| | |
|---|---|
| Net income taxable year, as shown in agent's report dated March 24, 1925 | $261,318.13 |
| Taxable at 12½% | 261,318.13 |
| Income tax | 32,664.77 |
| Previously assessed | 14,300.68 |
| Additional to be assessed | $18,364.09 |

UNITED STATES FERRO ALLOYS CORPORATION

Year ended December 31, 1924

SCHEDULE 3

Computation of Tax, 1924 Rates—Excess Profits Tax.

| | |
|---|---|
| Net income taxable year, agent's report dated March 24, 1925 | $54,302.39 |
| Taxable at 12½% | 54,302.39 |
| Income tax | 6,787.80 |
| Previously assessed | None. |
| Tax to be assessed | 6,787.80 |

160 *Petitioner's Exhibit No. 8*

TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE,
OFFICE OF INTERNAL REVENUE AGENT IN CHARGE, ROOM 431,
*April 14, 1925.*

In re: United States Ferro Alloys Corp.—old add., 41 East 42nd St.; 120 Bway, % Lawrence P. Mattingly, N. Y. City.
Date of Report: March 24, 1925.
Years examined: 1922 to 1924 incl.
SIEGFRIED LOEWENTHAL,
PERRY F. JACOBS,

Add'l Tax Due—$43,363.08

GENTLEMEN: There is transmitted herewith copy of a report covering examination recently made by a representative of this office covering your income tax liability, and a form of agreement which, if the adjustments suggested are satisfactory to you, you may sign and return to this office. The agreement, however, until approved by the Commissioner, upon a review of the examining officer's report in Washington, is not binding. In the event the report is not approved upon review in Washington and there are material changes, you will be given the benefit of due notice and afforded an opportunity to discuss the changes with this office.

161 If you do not agree with the conclusions stated in the report, it is desired that every opportunity be afforded you to present any objections or additional information which you believe might affect the result of the final decision of the Commissioner of Internal Revenue at Washington, D. C. The original of this report will, therefore, be held in this office for a period not to exceed twenty days from the date of this letter in order that you may, if you so desire, present any protests, briefs, or letters containing additional information. Such protests, briefs, or letters should be forwarded in triplicate to this office, where they will receive careful consideration before the report with all papers pertaining thereto is transmitted to the Department at Washington for final action. If you agree to the findings of the examining officer the report will be forwarded at once. In the event that you do not submit protest or brief within the twenty-day period, the report will immediately thereafter be forwarded to the Bureau. However, any appeal, protest, or additional information affecting the inclosed report should be directed to this office and not to the Bureau at Washington. If forwarded to the Bureau direct, it will be referred to this office for appropriate consideration.

No remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail.

Respectfully,

C. M. JUSTICE,
*Internal Revenue Agent in Charge.*

M. Mc.

## 162 United States Ferro Alloys Corp. #1

SCHEDULE #1.—*Year ended 12/31/22*

| | Per books | Unallowable deduction and addition to taxable income | Nontaxable income and other allowable deduction | Amended |
|---|---|---|---|---|
| Sales | $1,869,270.85 | | | $1,869,270.85 |
| Interest on notes, etc | 5,144.88 | | | 5,144.88 |
| Rents | 1,190.00 | | | 1,190.00 |
| Profit on sale of assets | 2,143.23 | | | 2,143.23 |
| Other income | 47.50 | | | 47.50 |
| | 1,877,796.46 | | | 1,877,796.46 |
| Inventory Jan. 1, 1922 | 266,690.75 | | | 266,690.75 |
| Labor, material, etc | 1,514,366.23 | | | 1,514,366.23 |
| | 1,781,056.98 | | | 1,781,056.98 |
| Inventory Jan. 1, 1923 | 189,865.96 | | | 189,865.96 |
| | 1,591,191.02 | | | 1,591,191.02 |
| Rent | 3,580.00 | | | 3,580.00 |
| Repairs | 57,785.44 | | | 57,785.44 |
| Taxes | 9,280.18 | | | 9,280.18 |
| Bad debts | 136.10 | | | 136.10 |
| Depreciation | 144,384.06 | (a)$88,235.29 | (b)$3,162.14 | 59,310.91 |
| Interest | 10,823.29 | | | 10,823.29 |
| | 1,817,180.09 | | | 1,732,106.94 |
| Profit per books | 60,616.37 | | | 145,689.52 |
| | 1,877,796.46 | 88,235.29 | 3,162.14 | 1,877,796.46 |

## 163 U. S. Ferro Alloys Corp. #2

SCHEDULE #2.—*Year ended December 31, 1923*

| | Per books | Unallowable deduction and addition to taxable income | Nontaxable income and other allowable deduction | Amended |
|---|---|---|---|---|
| Interest on deposits | $4,235.22 | | | $4,235.22 |
| Sales | 2,264,775.67 | | | 2,264,775.67 |
| Rents | 1,270.00 | | | 1,270.00 |
| Miscellaneous income | 305.25 | | | 305.25 |
| | 2,270,586.14 | | | 2,270,586.14 |
| Inventory Jan. 1, 1923 | 189,865.96 | | | 189,865.96 |
| Labor, material, etc | 2,067,838.93 | (d)$891.66 | | 2,066,947.27 |
| | 2,257,704.89 | | | 2,256,813.23 |
| Inventory Jan. 1, 1924 | 441,870.68 | | | 441,870.68 |
| | 1,815,834.21 | 891.66 | | 1,814,942.55 |
| Rent | 3,699.96 | | | 3,699.96 |
| Repairs | 70,242.94 | | | 70,242.94 |
| Interest | 29,487.23 | | | 29,487.23 |
| Taxes | 10,209.22 | | | 10,209.22 |
| Bad debts | 5,076.45 | | | 5,076.45 |
| Depreciation | 158,582.81 | (a)88,235.29 | (b)$3,162.14 | 73,509.66 |
| Royalties and patent license | 36,000.00 | (c)36,000.00 | | |
| Net loss | | | (e)2,100.00 | 2,100.00 |
| Adj. Petinot Salary | | | | |
| | 2,129,132.82 | | | 2,009,268.01 |
| Net income | 141,453.32 | 125,126.95 | 5,262.14 | 261,318.13 |

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## U. S. Ferro Alloys Corp. #3

SCHEDULE #3.—*Year ended December 20, 1924*

| | Books | Unallowable deduction additions to taxable income | Nontaxable income and other allowable deductions | Amended |
|---|---|---|---|---|
| Miscellaneous income | $5,690.82 | | | $5,690.82 |
| Liability, N. Petinot released | | (a)$11,250.00 | | 11,250.00 |
| Gross sales | 1,761,946.37 | | | 1,761,946.37 |
| | 1,767,637.19 | | | 1,778,887.19 |
| Inventory 1/1/24 | 441,870.68 | | | 441,870.68 |
| Materials, labor, etc | 1,595,643.66 | | | 1,595,643.66 |
| | 2,037,514.34 | | | 2,037,514.34 |
| Inventory 12/20/24 | 583,540.07 | | (b) $12,012.37 | 571,527.70 |
| | 1,453,974.27 | | | 1,465,986.64 |
| Salary, officers' | 9,677.48 | | | 9,677.48 |
| Rent | 3,601.59 | | | 3,601.59 |
| Repairs | 85,389.15 | | | 85,389.15 |
| Interest | 12,839.76 | | | 12,839.76 |
| Taxes | 9,459.81 | | | 9,459.81 |
| Depreciation | 157,422.63 | (c)85,784.31 | (d)3,162.14 | 74,800.46 |
| General expense | 62,829.91 | | | 62,829.91 |
| | 1,795,194.60 | | | 1,724,584.80 |
| Net profit | ($27,557.41) | | | 54,302.39 |

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## U. S. Ferro Alloys Corp. #4

SCHEDULE #4.—*Computation of tax 1922 rates—year ended 12/31/92*

| | | |
|---|---|---|
| Excess Profits Tax: | | |
| Net income, schedule | | $145,689.52 |
| Invested capital, Schedule | | |
| 8% of invested capital | | |
| Plus exemption $3,000.00 | | |
| Total credit | | |
| Tax computed under Sections 302 | | |
| Income tax: | | |
| Net income taxable year | $145,689.52 | |
| Less: | | |
| Interest U. S. obligations not exempt | | |
| Excess profits tax | | |
| Exemption | | |
| Balance taxable at 12½% | 145,689.52 | |
| Income tax | | 18,211.19 |
| Total income and tax | | 18,211.19 |
| Previously assessed | | None. |
| Additional to be assessed | | $18,211.19 |

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## U. S. Ferro Alloys Corp. #5

SCHEDULE #5.—*Computation of tax 1923 rates—year ended 12/31/23*

| | | |
|---|---|---|
| Excess profits tax: | | |
| Net income, schedule | | $261,318.13 |
| Invested capital, schedule | | |
| 8% of invested capital | | |
| Plus exemption $3,000.00 | | |
| Total | | |
| Tax computed under Sections 302 | | |
| Income tax: | | |
| Net income taxable year | $261,318.13 | |
| Less: | | |
| Interest U. S. obligations not exempt | | |
| Excess profits tax | | |
| Exemption | | |
| Balance taxable at 12½% | 261,318.13 | |
| Income tax | | 32,664.77 |
| Total income and excess profits tax | | 32,664.77 |
| Previously assessed | | 14,300.68 |
| Additional to be assessed | | $18,364.09 |

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## U. S. Ferro Alloys Corp. #6

SCHEDULE #6.—*Computation of tax 1924 rates—year ended 12/31/24*

| | | |
|---|---|---|
| Excess profits tax: | | |
| Net income, schedule | | $54,302.39 |
| Invested capital, Schedule | | |
| 8% of invested capital | | |
| Plus exemption $3,000.00 | | |
| Total credit | | |
| Tax computed under Sections 302 | | |
| Income tax: | | |
| Net income taxable year | $54,302.39 | |
| Less: | | |
| Interest U. S. obligations not exempt | | |
| Excess profits tax | | |
| Exemption | | |
| Balance taxable at 12½% | 54,302.39 | |
| Income tax | | 6,787.80 |
| Total income and tax | | 6,787.80 |
| Previously assessed | | None. |
| Additional to be assessed | | $6,787.80 |

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166 **U. S. Ferro Alloys Corp. #7**

EXHIBIT "A."—*Balance Sheet, January 1, 1922*

| | Books | Debit | Credit | Amended |
|---|---|---|---|---|
| ASSETS | | | | |
| Cash | $263, 235. 94 | | | $263, 235. 94 |
| Accounts and notes receivable | 344, 099. 21 | | | 344, 099. 21 |
| Accrued interest | 7, 083. 57 | | | 7, 083. 57 |
| Inventory | 266, 690. 75 | | | 266, 690. 75 |
| Deferred charges | 9, 626. 89 | | | 9, 626. 89 |
| Plant, patents, etc | 3, 114, 480. 61 | | (c)$20, 319. 35 | 3, 094, 161. 26 |
| Total | 4, 005, 216. 97 | | 20, 319. 35 | 3, 984, 897. 62 |
| LIABILITIES | | | | |
| Notes payable | 325, 000. 00 | | | 325, 000. 00 |
| Accounts payable | 150, 161. 13 | | (a)870. 94 | 151, 032. 07 |
| Accrued and deferred liabilities | 341, 129. 00 | | | 341, 129. 00 |
| Reserve for depreciation and amortization | 30, 711. 33 | (c)$40, 441. 17<br>(d)20, 319. 35<br>(b)88, 235. 29 | | 71, 715. 82 |
| Capital stock | 3, 000, 000. 00 | | | 3, 000, 000. 00 |
| Sub. to pfd. exp. stock | 49, 300. 00 | (d)1, 200. 00 | | 48, 100. 00 |
| Surplus | (81, 084. 49) | | (d)1, 200. 00<br>(b)88, 235. 29<br>(c)40, 441. 17 | 47, 921. 03 |
| Total | 4, 005, 216. 97 | 151, 066. 85 | 130, 747. 50 | 3, 984, 897. 62 |

EXHIBIT "A-1."—*Explanation of Items, Changed, Unchanged—Balance Sheet, January 1, 1922*

For these changes, see prior report dated May 16, 1924.

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167 **U. S. Ferro Alloys Corp. #8**

EXHIBIT "B."—*Balance Sheet, January 1, 1923*

| | Books | Debit | Credit | Amended |
|---|---|---|---|---|
| ASSETS | | | | |
| Cash | $179, 481. 89 | | | $179, 481. 89 |
| Notes receivable | 192, 640. 20 | | | 192, 640. 20 |
| Accounts receivable | 281, 757. 79 | | | 281, 757. 79 |
| Inventory | 189, 865. 96 | | | 189, 865. 96 |
| Stock, colonial chrome | 20, 000. 00 | | | 20, 000. 00 |
| Deferred charges | 7, 138. 45 | | | 7, 138. 45 |
| Building, equipment-patents | 3, 149, 790. 80 | | (a)$20, 319. 35 | 3, 129, 471. 45 |
| Organization expenses | 10. 50 | | | 10. 50 |
| Total | 4, 020, 885. 29 | | 20, 319. 35 | 4, 000, 365. 94 |
| LIABILITIES | | | | |
| Accounts payable | 325, 717. 63 | | | 325, 717. 63 |
| Notes payable | 100, 000. 00 | | | 100, 000. 00 |
| Taxes, commission expense | 6, 732. 91 | | | 6, 732. 91 |
| Subsc. to capital stock | 48, 100. 00 | | | 48, 100. 00 |
| Capital stock | 3, 000, 000. 00 | | | 3, 000, 000. 00 |
| Surplus | (20, 139. 06) | (c)$3, 162. 14 | (d)88, 235. 29<br>(b)128, 676. 46 | 193, 610. 55 |
| Reserve for depreciation | 360, 273. 81 | (a)20, 319. 35<br>(b)128, 676. 46<br>(d)88, 235. 29 | (c)3, 162. 14 | 126, 204. 85 |
| Total | 4, 020, 885. 29 | 240, 393. 24 | 220, 073. 89 | 4, 000, 365. 94 |

EXHIBIT B-1.—*Explanation of Items, Changed, Unchanged—Balance Sheet, January 1, 1923*

(a) See Balance Sheet 12/31/21.
(b) See Balance Sheet 12/31/21.
(c) See 1922 Explanation of Changes, item (b).
(d) See 1922 Explanation of Changes, item (a).

H9

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## U. S. Ferro Alloys Corp. #9

EXHIBIT "C".—*Balance Sheet, January 1, 1924*

| | Books | Debit | Credit | Amended |
|---|---|---|---|---|
| ASSETS | | | | |
| Cash | $207,816.70 | | | $207,816.70 |
| Notes Receivable | 192,640.20 | | | 192,640.20 |
| Accounts Receivable | 392,797.10 | | | 392,797.10 |
| Inventories | 441,870.68 | | | 441,870.68 |
| Stock, Colonial Chrome | 20,000.00 | | | 20,000.00 |
| Stock-Unico Co | 100.00 | | | 100.00 |
| Deferred Charge | 9,621.49 | | | 9,621.49 |
| Organization Exp | 10.80 | | | 10.80 |
| Building, Equipment & Patents | 3,158,746.14 | | (a) $20,319.35 | 3,138,426.79 |
| Total | $4,423,602.81 | | 20,319.35 | $4,403,283.46 |
| LIABILITIES | | | | |
| Notes Payable | 250,000.00 | | | 250,000.00 |
| Accounts Payable | 498,255.41 | | | 498,255.41 |
| Accrued Taxes, Commission | 9,301.58 | | | 9,301.58 |
| Reserve for Bad Debts | 3,887.31 | | | 3,887.31 |
| Reserve for Depreciation | 502,944.28 | (a) $20,319.35<br>(b) 216,911.75<br>(c) 88,235.29 | (d) 6,324.28 | 183,802.14 |
| Preferred Stock | 40,000.00 | | | 40,000.00 |
| Common Stock | 3,000,000.00 | | | 3,000,000.00 |
| Surplus | 119,214.26 | (d) 6,324.28 | (b) 216,911.75<br>(c) 88,235.29 | 418,037.02 |
| Total | $4,423,602.81 | | | 4,403,283.46 |

EXHIBIT C-1.—*Explanation of Items, Changed, Unchanged.—Balance Sheet, January 1, 1924*

(a) See balance sheet 12/31/21 explanation of changes.
(b) Accumulated depreciation on patents disallowed.
(c) Depreciation on patents 1923 disallowed.
(d) Additional depreciation allowed 1922 and 1923. See explanation of changes 1922 and 1923 income.

H10

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## U. S. Ferro Alloys Corp. #10

EXHIBIT "D".—*Balance sheet, Dec. 20, 1924*

| | Books | Debit | Credit | Amended |
|---|---|---|---|---|
| ASSETS | | | | |
| Cash | $96,089.32 | | | $96,089.32 |
| Accounts Receivable | 264,345.39 | | | 264,345.39 |
| Inventories | 571,527.70 | | | 571,527.70 |
| Claims | 2,714.93 | | | 2,714.93 |
| Colonial Chrome | 192,640.20 | | | 192,640.20 |
| Stock, Colonial Chrome | 20,000.00 | | | 20,000.00 |
| Deferred Items | 10,558.34 | | | 10,558.34 |
| Properties, Patent & Process | 3,165,146.96 | | (a) $20,319.35 | 3,144,827.61 |
| Total | $4,323,033.84 | | | $4,302,714.49 |
| LIABILITIES | | | | |
| Accounts Payable | $268,480.97 | | | 268,480.97 |
| Colonial Chrome, Ltd | 2,900.97 | | | 2,900.97 |
| Vanadium Corp | 388,815.50 | | | 388,815.50 |
| Reserve for Depreciation | 635,908.36 | (a) $20,319.35<br>(b) 305,147.04<br>(c) 85,784.31 | (d) 9,486.42 | 234,144.08 |
| Reserve, Federal Income Tax | 1,150.00 | | | 1,150.00 |
| Capital Stock | 3,000,000.00 | | | 3,000,000.00 |
| Surplus | 75,778.04 | (d) 9,486.42 | (b) 305,147.04<br>(c) 85,784.31 | 457,222.97 |
| Total | $4,423,033.84 | | | $4,302,714.49 |

EXHIBIT "D-1".—*Explanation of Items, Changed, Unchanged.—Balance sheet, December 20, 1924*

(a) See Balance Sheet December 31, 1921.
(b) Accumulated depreciation on patents disallowed up to December 31, 1923.
(c) Depreciation on patents 1924 disallowed.
(d) Additional depreciation allowed 1922, 1923, 1924. See explanation of changes 1922 income.

H.11

170 U. S. Ferro Alloys Corp. #11

EXHIBIT "E".—*Reconciliation of amended surplus with taxable net income, year ended 12/31/22*

| | | Per Books | | Amended |
|---|---|---|---|---|
| Surplus 1/1/22 | | $(31,064.49) | | $47,921.08 |
| Add: | | | | |
| Income per books & Taxable Income | $60,616.37 | | 200,426.47 | 145,669.87 |
| Adj. Water Power | 1,200.00 | | | |
| | | 61,816.37 | | |
| Deduct: | | | | |
| Adj. 1921-22 Comm | | 870.94 | | |
| Surplus 12/31/22 | | $(20,139.06) | | $193,610.55 |

H12

U. S. Ferro Alloys Corp. #12

EXHIBIT "F".—*Analysis of surplus and reconciliation of amended surplus with amended taxable net income, year ended 12/31/23*

| | | Per Books | | Amended |
|---|---|---|---|---|
| Surplus 12/31/22 | | $(20,139.06) | | $193,610.55 |
| Additions: | | | | |
| Income per books and taxable net income | $141,453.32 | 141,453.32 | 261,318.13 | 261,318.13 |
| Deduct: | | | | |
| Adj. Petinot Salary | | 2,100.00 | | |
| Contributions | | | 891.56 | |
| Unallowable deduction | | | 36,000.00 | 36,891.56 |
| Royalty and Patent | | | | |
| Surplus 12/31/23 | | $119,214.26 | | $418,037.02 |

H13

171 U. S. Ferro Alloys Corp. #13

EXHIBIT "G."—*Analysis of surplus and reconciliation of amended surplus with amended taxable net income, period ended 12/20/24*

| | | Per Books | | Amended |
|---|---|---|---|---|
| Surplus 12/31/23 | | $119,214.26 | | $418,037.02 |
| Additions: | | | | |
| Income per books and taxable income | $(27,557.41) | | | 84,302.39 |
| Release Liability, N. Petinot | 11,250.00 | | | |
| | | (16,307.41) | | |
| Additional Depreciation allowed | | | 12,012.37 | 12,012.37 |
| Deductions: | | | | |
| Contributions | 8,233.34 | | | |
| 1923 Tax | 14,300.68 | | | |
| Additional Tax | 3,444.79 | | | |
| Res. for Taxes | 1,150.00 | | | |
| | | 27,128.81 | | 27,128.81 |
| Surplus 12/20/24 | | $75,778.04 | | $481,222.97 |

H14

EXHIBIT "H".—*United States Ferro Alloys Corporation, schedule of depreciation—Depreciation was taken on monthly balances*

[NOTE.—Three shifts per day, or 24 hours continuous operation, includes additional depreciation on property sold or retired, less residual value].

| Property | Cost, December 31, 1921 | Additions, 1922 | Cost, December 31, 1922 | Rate | Depreciation charged | Additions, 1923 | Cost, December 31, 1923 | Rate | Depreciation charged |
|---|---|---|---|---|---|---|---|---|---|
| Buildings—Furnace Room | $239,571.14 | $435.61 | $240,006.75 | 3 | $7,190.67 | $468.49 | $240,475.24 | 3 | $7,505.97 |
| " Machine Shop | 7,390.82 | | 7,390.82 | 2 | 147.82 | | 7,390.82 | 2 | 147.81 |
| " Storeroom C | 7,058.52 | | 7,058.52 | 5 | 352.93 | | 7,058.52 | 5 | 352.93 |
| " Cooling Plant | 4,548.34 | | 4,548.34 | 5 | 227.42 | | 4,548.34 | 5 | 227.42 |
| " Office and Laboratory | 15,078.30 | | 15,078.30 | 2 | 301.57 | | 15,078.30 | 2 | 301.56 |
| " Garage | 4,276.00 | | 4,276.00 | 3 | 128.28 | | 4,276.00 | 3 | 128.26 |
| " Scale House | 166.63 | | 166.63 | 5 | 8.33 | | 166.63 | 5 | 8.33 |
| " Hopper | 2,585.96 | | 2,585.96 | 5 | 129.30 | | 2,585.96 | 5 | 129.30 |
| " Storeroom D | 11.02 | | 11.02 | 2 | .22 | | 11.02 | 2 | .22 |
| " Storeroom E | 2,815.13 | | 2,815.13 | 2 | 56.30 | 109.43 | 2,924.56 | 5 | 58.95 |
| " Storeroom Lime | | 443.91 | 443.91 | 5 | 5.54 | | 443.91 | 5 | 22.20 |
| " Storeroom Silica Sand | | 1,384.43 | 1,384.43 | 5 | 12.27 | | 1,384.43 | 5 | 69.23 |
| Dwellings | 26,117.09 | | 26,117.09 | 3 | 783.51 | | 26,117.09 | 3 | 783.51 |
| Land and Building Appurtenances: | | | | | | | | | |
| Sewerage system | 14,906.91 | | 14,906.91 | 5 | 745.35 | | 14,906.91 | 5 | 745.35 |
| Fire Hydrants & Water Supply | 579.96 | | 579.96 | 5 | 28.99 | | 579.96 | 5 | 29.00 |
| Yard Paving & Concrete Ore Apron | 11,389.52 | 1,568.21 | 12,957.73 | 10 | 1,172.83 | (1,750.00) | 11,207.73 | 10 | 1,265.77 |
| Fence | 4,482.09 | | 4,482.09 | 5 | 224.10 | | 4,482.09 | 5 | 224.10 |
| Gasoline Storage | 88.35 | | 88.35 | 5 | 4.42 | | 88.35 | 5 | 4.42 |
| Power Transmission | 3,223.88 | 1,112.21 | 4,336.09 | 5 | 171.20 | 1,708.52 | 6,044.61 | 5 | 270.41 |
| Heating System | 4,745.01 | | 4,745.01 | 5 | 237.25 | | 4,745.01 | 5 | 237.25 |
| Road Improvements | 14.43 | | 14.43 | 10 | 1.44 | | 14.43 | 10 | 1.44 |
| Land Improvements | 150.00 | | 150.00 | 5 | 7.50 | | 150.00 | 5 | 7.50 |
| Equipment, Production Department: | | | | | | | | | |
| Belt Conveyor & Shuttle | 3,987.44 | 18.93 | 4,006.37 | 20 | 790.07 | | 4,006.37 | 20 | 801.24 |
| Bridge Cranes | 21,512.87 | | 21,512.87 | 20 | 4,302.57 | | 21,512.87 | 20 | 4,302.57 |
| Conveyors, Skips, etc | 1,001.14 | | 1,001.14 | 25 | 230.29 | (360.24) | 440.90 | 25 | 401.78 |
| Furnaces | 80,158.91 | 7,004.95 | 87,163.86 | 15 | 9,609.16 | 514.62 | 87,678.48 | 15 | 17,348.56 |
| Cooling Plant Equipment | 1,850.00 | 329.61 | 2,089.61 | 15 | 339.44 | 377.80 | 3,067.41 | 15 | 436.48 |
| Transformers—Electric Equipment | 100,784.31 | 1,584.51 | 102,368.82 | 15 | 15,191.31 | 1,342.13 | 103,710.95 | 15 | 15,495.87 |
| Crushers | 2,192.80 | 3,371.04 | 5,563.84 | 20 | 859.78 | | 5,563.84 | 20 | 1,112.77 |
| Mixers | 2,844.49 | 376.51 | 3,221.00 | 20 | 576.50 | | 3,221.00 | 20 | 644.20 |
| Scales | 1,664.29 | 343.78 | 2,008.07 | 20 | 342.19 | 383.54 | 2,391.61 | 20 | 442.73 |
| Crushing & Sizing Plant | | 3,379.53 | 3,379.53 | 20 | 75.78 | 367.37 | 3,746.90 | 20 | 668.66 |

EXHIBIT "H".—*United States Ferro Alloys Corporation, schedule of depreciation—Depreciation was taken on monthly balances*—Continued

| Property | Cost, December 31, 1921 | Additions, 1922 | Cost, December 31, 1922 | Rate | Depreciation charged | Additions, 1923 | Cost, December 31, 1923 | Rate | Depreciation charged |
|---|---|---|---|---|---|---|---|---|---|
| Equipment, Maintenance Department: | | | | | | | | | |
| Machinery | $2,556.03 | | $2,556.03 | 10 | $255.60 | | $2,556.03 | 10 | $255.60 |
| Shafting & Belting | 272.63 | | 272.63 | 8 | 21.81 | | 272.63 | 8 | 21.81 |
| Tools | 1,400.96 | | 1,400.96 | 25 | 350.24 | | 400.36 | 25 | 350.24 |
| Equipment, Receiving, Shipping & Stock: | | | | | | | | | |
| Track Scales | 8,801.92 | | 8,801.92 | 5 | 440.10 | | 8,801.92 | 5 | 440.10 |
| Locomotive Crane | 5,000.00 | $5,740.75 | 10,740.75 | 20 | 1,570.06 | | 10,740.75 | 20 | 2,148.15 |
| Locomotive & Cart | 16,028.68 | 835.00 | 16,863.68 | 12½ | 2,044.07 | $2,229.68 | 19,093.36 | 12½ | 3,568.05 |
| Railroad Track | 30,123.44 | 2,881.67 | 32,005.11 | 6¼ | 2,018.98 | 1,427.15 | 33,432.26 | 6¼ | 2,198.74 |
| Motor Truck & Garage Equipment | 3,206.13 | | 3,206.13 | 25 | 801.57 | | 3,206.13 | 25 | 801.58 |
| Shipping Department Tools | 11.84 | 1,050.30 | 1,061.84 | 25 | 22.62 | 21.60 | 1,083.44 | 25 | 266.83 |
| Cranes & Buckets | 19,498.35 | 8.03 | 19,506.38 | 10 | 1,950.56 | | 19,506.38 | 10 | 1,950.64 |
| Pulverising Plant | | 78.94 | 78.94 | | | 6,737.30 | 6,816.24 | 20 | 718.37 |
| Other Equipment: | | | | | | | | | |
| Laboratory | 1,554.23 | 120.40 | 1,674.63 | 5 | 78.92 | | 1,674.63 | 5 | 83.73 |
| Experimental | 325.96 | | 325.96 | 25 | 81.49 | | 325.96 | 25 | 81.49 |
| Dwellings | 47.20 | | 47.20 | 20 | 9.44 | | 47.20 | 20 | 9.44 |
| Plant Office (Niagara) | 2,415.90 | 44.20 | 2,460.10 | 8 | 196.11 | 304.15 | 2,764.25 | 8 | 208.31 |
| Automobile | 1,100.00 | 550.00 | 1,650.00 | 25 | 275.00 | | 1,650.00 | 25 | 412.50 |
| Club House | 26.03 | | 26.03 | 15 | 3.90 | | 26.03 | 15 | 3.90 |
| New York Office Equipment | 3,830.06 | 249.50 | 4,079.57 | 8 | 320.15 | 46.00 | 4,125.57 | 8 | 328.57 |
| Lewiston Quarry | 6,115.06 | (1,002.68) | 5,112.38 | 20 | 1,116.54 | 291.25 | 5,403.63 | 20 | 2,057.37 |
| Cottage, Black Lake | | 5,765.85 | 5,765.85 | 5 | 288.29 | | 5,765.85 | 5 | 288.29 |
| Patents | 1,500,000.00 | | 1,500,000.00 | 1/17 | 88,235.29 | | 1,500,000.00 | 1/17 | 88,235.29 |
| Totals | $2,1[illegible]6,509.48 | $38,185.19 | $2,174,694.67 | ..... | $144,384.06 | $14,018.79 | $2,188,713.46 | ..... | $158,882.81 |

SCHEDULE I. FEDERAL TAX RETURN DECEMBER 1924

| Property | Date acquired | Balance, December 31, 1923 | Additions in 1924 | Balance, December 20, 1924 | Depreciation |
|---|---|---|---|---|---|
| Buildings, Plant Operation | 1919 | $286,343.73 | $1,553.52 | $287,897.25 | $5,438.25 |
| Dwellings | " | 26,117.09 | | 26,117.09 | 761.74 |
| Land and Building Appurtenances | " | 42,219.09 | 1,285.14 | 43,504.23 | 2,622.01 |
| Equipment—Production Dept | " | 205,340.33 | (1,418.44) | 203,921.89 | 48,264.50 |
| " Maintenance Dept | " | 4,229.62 | 588.44 | 4,818.06 | 360.42 |
| " Receiving | " | | | | |
| Shipping and Stock Dept | " | 102,680.66 | 2,535.27 | 105,215.93 | 10,632.88 |
| Equipment and General Engineering | " | 2,000.59 | | 2,000.59 | 135.90 |
| " Dwellings | " | 47.20 | | 47.20 | 9.19 |
| " Plant Office | " | 4,440.28 | 48.35 | 4,488.63 | 621.99 |
| Equipment—Quarry | 1920 | 5,403.63 | | 5,403.63 | 1,455.46 |
| " New York Office | 1919 | 4,125.57 | 56.00 | 4,181.57 | 325.98 |
| Patents | 1920 | 1,500,000.00 | | 1,500,000.00 | 85,784.31 |
| Black Lake Cottage | | 5,795.67 | | | |
| Totals | | $2,188,713.46 | $4,648.28 | $2,187,896.07 | $157,422.63 |

H15

173 U. S. Ferro Alloys Corp. #15

EXHIBIT "I".—*Schedule of depreciation on cost of additional equipment charged to H. C. Sicard account*

| Property | Cost of additions, 12/31/21 | Rate | Depreciation | | |
|---|---|---|---|---|---|
| | | | 1922 | 1923 | 1924 |
| Buildings, Furnace Room | $49,984.06 | 3% | $1,499.52 | $1,499.52 | $1,499.52 |
| Buildings, Office and Laboratory | 2,425.00 | 2 | 48.50 | 48.50 | 48.50 |
| Dwellings | 1,033.66 | 3 | 31.01 | 31.01 | 31.01 |
| Land and Building Appurtenances: | | | | | |
| Sewerage System | 990.35 | 5 | 49.52 | 49.52 | 49.52 |
| Fence | 4,485.00 | 5 | 224.25 | 224.25 | 224.25 |
| Heating System | 2,060.84 | 5 | 103.04 | 103.04 | 103.04 |
| Equipment, Production Department: | | | | | |
| Furnaces | 3,093.27 | 15 | 463.99 | 463.99 | 463.99 |
| Transformers and Electrical Equipt | 4,809.25 | 15 | 721.39 | 721.39 | 721.39 |
| Equipment, Maintenance Dept.: Shafting and Belting | 122.63 | 8 | 9.81 | 9.81 | 9.81 |
| Equipment, Receiving, Shipping, and Stock Department: Track Scales | 109.29 | 5 | 5.46 | 5.46 | 5.46 |
| Plant Office Equipment | 70.68 | 8 | 5.65 | 5.65 | 5.65 |
| Totals | $69,184.12 | ..... | 3,162.14 | 3,162.14 | 3,162.14 |

H16

174 U. S. Ferro Alloys Corp. #16

EXHIBIT "J".—*Reconciliation of plant patent account on balance sheet with that on depreciation schedule*

| | Dec. 31, 1921 | Dec. 31, 1922 | Dec. 31, 1923 | Dec. 31, 1924 |
|---|---|---|---|---|
| Total assets per depreciation Schedule | $2,136,509.48 | $2,174,694.67 | $2,188,713.46 | $2,187,596.07 |
| Add: Stock issued for no assets Debit made to Plant Account not included in Depreciation Schedule | 800,000.00 | 800,000.00 | 800,000.00 | 800,000.00 |
| Additional Assets, Cost of Additional Equipment | 69,184.12 | 69,184.12 | 69,184.12 | 69,184.12 |
| Amount Stock issued in excess of actual value | 88,467.66 | 85,592.66 | 80,529.21 | 88,047.42 |
| Total Plant Patent Account Per Balance Sheet | $3,094,161.26 | $3,129,471.45 | $3,138,426.79 | $3,144,827.61 |

H17

175 U. S. Ferro Alloys Corp. #17

EXHIBIT "K."—*Reconciliation of income per books with income per return and with taxable net income, year ended 12/31/22*

| | | |
|---|---|---|
| Net income per books | | $60,616.37 |
| Additions: Adj. power contract | $1,200.00 | |
| Deductions: | | |
| 1921 net loss | 85,893.33 | |
| Adj. Commission | 870.94 | |
| Net income for taxpayer per return | | (24,947.90) |
| Additions: | | |
| 1921 net loss | 85,893.33 | |
| Commission | 870.94 | |
| 1922 depreciation patents | 88,235.29 | |
| Deductions: | | |
| 1922 additional depreciation allowed | 3,162.14 | |
| 1200 water power adj | 1,200.00 | |
| Net income as corrected | | 145,689.52 |

H18

176 U. S. Ferro Alloys Corp. #18

EXHIBIT "L."—*Reconciliation of income per books with income per return and with taxable net income, year ended December 31, 1923*

| | | |
|---|---|---|
| Net income per books | | $141,453.32 |
| Additions | None. | |
| Reductions: | | |
| 1922 Net Loss | $24,947.90 | |
| Adj. Petinot salary | 2,100.00 | |
| Income per taxpayer's tax return | | 114,405.42 |
| Additions: | | |
| 1923 depreciation patents | 88,235.29 | |
| Royalty and patent license | 36,000.00 | |
| 1932 loss | 24,947.90 | |
| Contributions | 891.66 | |
| Deductions: Additional depreciation | 3,162.14 | |
| Net income as corrected | | 261,318.13 |

H19

U. S. Ferro Alloys Corp. #19

EXHIBIT "M."—*Reconciliation of income per books with income per return and with taxable net income, period ended December 20, 1924*

| | | |
|---|---|---|
| Net income per books | | $(27,557.41) |
| Additions | None. | |
| Reduction: Depreciation and repairs | | 12,012.37 |
| Income per taxpayer's return | | (39,569.78) |
| Additions: | | |
| Depreciation patents | $85,784.31 | |
| Release liability, N. Petinot | 11,250.00 | |
| Deductions: Additional depreciation allowed | 3,162.14 | |
| Net income as corrected | | 54,302.39 |

H20

177 Before United States Board of Tax Appeals

[Title omitted.]

*Præcipe for transcript of record*

Filed May 18, 1934

To the clerk of the United States Board of Tax Appeals:

Please prepare a consolidated transcript of record in the above-entitled proceedings and transmit the same to the Clerk of the United States Circuit Court of Appeals of the Second Circuit and include in said transcript certified copies of the following documents:

1. Docket entries of the proceedings before the Board in Dockets No. 44061, 47451, and 47973.

2. Pleadings before the Board.

(a) Petition including annexed copy of deficiency letter, in all three appeals.

(b) Answer in all three appeals.

(c) Motion for consolidation of Dockets No. 44061, 47451, and 47973, and the order granting said motion.

3. Findings of fact, opinion and decision of the Board promulgated August 11, 1933.

4. Order entered August 23, 1933, directing that the report of Division 9 promulgated August 11, 1933, be reviewed by the Board.

178 5. Opinion dated October 17, 1933, written as the result of order entered August 23, 1933.

6. Petitions for review in Dockets No. 44061, 47451, and 47973, together with proof of service of notice of filing petitions for review and of service of a copy of petition for review in each appeal.

7. Statement of evidence as settled and allowed, together with all of the Exhibits which were received in evidence by the Board.

8. This praecipe.

We hereby agree that the foregoing præcipe is correct; that the records, documents, papers, and proceedings therein set forth are sufficient and a complete record in this cause on appeal and we hereby adopt the foregoing as a list designated by each of the parties to this cause to be a complete record and we hereby waive the issuance and service of notice upon any party hereto and agree that said præcipe shall be obeyed by and acted upon by the clerk in the same manner as if said præcipe had been regularly filed and a copy thereof served upon each party hereto.

(Signed) JAMES P. QUIGLEY,
JAMES P. QUIGLEY,
*Attorney of record for Parker Sloane and Hugh C. Sicard.*

(Signed) JOHN F. McCABE,
JOHN F. McCABE,
*Attorney of record for John J. Watts.*

ROBERT H. JACKSON,
*General Counsel, Bureau of Internal Revenue.*

179 [Clerk's certificate to foregoing transcript omitted in printing.]

180 In United States Circuit Court of Appeals for the Second Circuit

Nos. 91–93. October term, 1934

Argued January 9, 1935. Decided March 4, 1935

JOHN J. WATTS, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, respondent

HUGH C. SICARD, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, respondent

PARKER SLOANE, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, respondent

Appeal from the Board of Tax Appeals

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges

Petitions to review decisions of the Board of Tax Appeals by three taxpayers against whom like deficiencies in income taxes for 1924 were sustained on identical facts and for the same reasons. Reversed.

James P. Quigley, of Olean, N. Y., John F. McCabe, of New York City, and Robert J. Helberle, for petitioners.

J. S. Y. Ivins, of Washington, D. C. (Brewster, Ivins & Phillips, of Washington, D. C., of counsel), amicus curiæ.

Edward H. Green and John A. Woodbridge, both of New York City (Sullivan & Cromwell and Samuel Seabury, all of New York City, of counsel), amicus curiæ.

*Opinion*

CHASE, Circuit Judge.

As the petitions all raise the same questions and were argued together, one opinion will be sufficient to dispose of them.

In December 1924, the three petitioners, owning all of the stock of United States Ferro Alloys Corporation, a corporation to be hereafter designated merely as Alloys, exchanged all of their stock for stock in the Vanadium Corporation of America, a corporation which will herein be called Vanadium, and for mortgage bonds of Alloys which were guaranteed both as to the payment of principal

and of interest by Vanadium. The contract was made in behalf of all of the petitioners by one of them and provided that an agreed number of Vanadium shares should be placed in escrow until January 1, 1926, from which there should be transferred to each of the petitioners such an amount of the stock, whose value for the purposes of the exchange was agreed to be $30 per share, as should be determined on the basis of the demonstrated earning power of Alloys in
181 1925. The contract was fully performed, and, when performed, the petitioners had, in place of all the stock of Alloys, 32,103 shares of Vanadium and bonds of Alloys to the amount of $1,161,194.50. Though the contract also included payments by Vanadium in cash to creditors of Alloys, the parties stipulated before the Board that the petitioners thereby received no taxable income. The business of Alloys continued to be conducted by that corporation until it was dissolved in 1928.

The position the respondent takes is that the petitioners sold their stock in Alloys and are taxable upon gains then realized as by a sale of stock at a profit. The petitioners contend that the transaction was tax free under section 203 of the Revenue Act of 1924 (26 U. S. C. A., § 934), because they received only stock and bonds of corporations which were parties to a reorganization within the meaning of that statute.

The controlling facts may be stated in one sentence. The petitioners exchanged all of the stock of Alloys solely for stock in Vanadium and bonds of Alloys.

Section 203 (b) (2) of the Revenue Act of 1924 (26 U. S. C. A., § 934 (b) (2)), provided that: "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

And section 203 (h) of the same statute provided, so far as here applicable, that: "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. * * *)" 26 U. S. C. A., § 934 (h) (1) (A).

Article 1574 of T. R. 65, insofar as pertinent to the present problem, provided that under the law above noted "* * * no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization. * * * If two or more corporations reorganize, for example, by either * * * (3) the sale of the stock of B to A, or * * * (6) the acquisition by A of a majority of the total number of shares of all other classes of stock of B. * * *"

Since the transaction here involved is one that verbally falls within the concept of "reorganization" as shown by the regulation—as all of the stock of Alloys went to Vanadium, either subdivision (3) or (6) covers the transaction—the real issue is simply

whether the regulation has unlawfully broadened the statutory definition of "reorganization." The plan of reorganization was the contract made and performed.

In the above statute it will be seen that reorganization was defined to be a merger or consolidation, with those terms somewhat expanded by matter in parenthesis "so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462, 470, 53 S. Ct. 257, 260, 77 L. Ed. 428. In Cortland Specialty Co. v. Commissioner, 60 F. (2d) 937, we had before us the taxable effect under the similar section 203 (h) (1) of the Revenue Act of 1926, 26 U. S. C. A., § 934 (h) (1) of a sale of the assets of a corporation for cash and short-term notes, and held that the gain from the transaction was not tax free. In that connection we discussed merger and consolidation generally in their relation to a reorganization within the meaning of the statute, but the facts there did not present the issue now before us. And in C. H. Mead Coal Co. v. Commissioner (C. C. A.) 72 F. (2d) 22, while the precise question here was not involved, the necessity for giving a liberal scope to the words "merger" and "consolidation" as used in the statute, which, as already noticed, was in respects now essential like the statute controlling here, was recognized.

We think the legislative history of the statute requires its interpretation in a way which shows that the Board in this instance was in error in sustaining the deficiencies. It was divided in opinion, with the majority taking the view that there was no "reorganization" while there was no dissolution of Alloys.

In the Revenue Act of 1918, Congress for the first time
182 dealt with the effect of reorganization upon taxation, and provided in section 202 (b), 40 Stat. 1060 that "* * * when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange. * * *"

The terms "reorganization", "merger", and "consolidation" were left without especial definition for the purposes of the statute, and the Treasury Department promulgated Regulations 45, which required in such a situation as that before us the dissolution of the corporation whose stock was acquired by another corporation as a condition precedent to sustaining the claim of freedom from taxation which the petitioners make. In 1921, however, Congress saw fit to change the statute and then included in section 202 (c) (2) of the 1921 act, 42 Stat. 230, the same statutory definition of reorganization which was carried into the 1924 act and is effective here. The term "reorganization" was the subject of some controversy between

the House and the Senate, but this was resolved as is shown by the report of the conference committee, which stated:

"The Senate amendment adds to this definition the case where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation; * * * and the House recedes." Conf. Rep. No. 486, 67th Congress, 1st session, pp. 17 and 18.

After the 1921 act went into effect, the Treasury Department promulgated regulations which differed from those under the 1918 act. The language found both in subdivision (3) and in (6) of T. R. 65, art. 1574, above quoted, was used to define a reorganization. T. R. 62, art. 1566 (b). It will thus be seen that the regulations no longer required a dissolution of the corporation whose stock was acquired in order to entitle persons in the situation of these petitioners to make such an exchange on a tax-free basis.

In 1924 Congress enacted the statute under which these deficiencies were assessed, and then had under consideration whether article 1566 of T. R. 62, in providing that in the case of a reorganization no gain or loss should be recognized to the corporations as well as to the stockholders, had, in putting the corporations in a reorganization on the same basis with stockholders, gone beyond the scope of the 1921 act. It was proposed to resolve this difficulty by changing the statute so as to eliminate all doubt about the validity of the regulations in this respect. The Senate committee reported on the subject that:

"There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department is of doubtful legality and a statutory provision is most necessary." Sen. Rep. No. 398, 68th Congress, 1st session, pp. 14 and 15.

This proposed change was made. Nevertheless, the definition of reorganization as it had been in section 202 (c) of the 1921 act was reenacted without material change in section 203 (h) (1) in the 1924 act, 26 U. S. C. A., § 934 (h) (1). Under well-established principles of construction, this reenactment of the definition of reorganization after it had been interpreted by regulation is strong evidence that Congress intended section 203 (h) (1) to include within the meaning of the word as there defined such an exchange of stock for stock and bonds as these petitioners made. Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 55 S. Ct. 127, 79 L. Ed. —; United States v. Dakota-Montana Oil Co., 288 U. S. 459, 53 S. Ct. 435, 77 L. Ed. 893; Norwegian Nitrogen Products Co v. United States, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; Costanzo v. Tillinghast, 287 U. S. 341, 53 S. Ct. 152, 77 L. Ed. 350; McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 51 S. Ct. 510, 75 L. Ed. 1183; Shearman v. Commissioner (C. C. A.) 66 F. (2d) 256. In our opinion, therefore, subdivisions (3) and (6) of article 1574 of T. R. 65 are valid, and either makes it impossible to affirm the deci-

sion of the Board of Tax Appeals sustaining the deficiencies determined in the case of each of these petitioners. Having had the opportunity, it is to be presumed that, if Congress had intended, contrary to the regulation in force, to have the gain from such an ex-
183 change as this be tax free only when there was a dissolution of one of the corporations or some other change in the corporate structure such as would commonly take place in a merger or consolidation, strictly speaking, it would have said so. The fact that it changed a related part of the statute to remove any doubt as to the validity of a regulation and at the same time reenacted the part which had been construed by the regulation which governs here shows an adoption of such construction. National Lead Co. v. United States, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496; United States v. Cerecedo Hermanos Y Compania, 209 U. S. 337, 28 S. Ct. 532, 52 L. Ed. 821; Francisco Sugar Co. v. Commissioner (C. C. A.) 47 F. (2d) 555.

Decisions reversed.

184 In United States Circuit Court of Appeals, Second Circuit

JOHN J. WATTS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decree filed March 11, 1935*

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

185 [File endorsement omitted.]

186 In United States Circuit Court of Appeals, Second Circuit

HUGH C. SICARD, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decree filed March 11, 1935*

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

187 [File endorsement omitted.]

188 In United States Circuit Court of Appeals, Second Circuit

PARKER SLOANE, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Decree filed March 11, 1935*

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

189 [File endorsement omitted.]

190 [File endorsement omitted.]

191 In United States Circuit Court of Appeals for the Second Circuit

[Titles omitted.]

No. 91

No. 92

No. 93

*Petition for rehearing filed March 18, 1935*

192 Comes now the petitioner, the Commissioner of Internal Revenue, by his attorneys, and petitions this honorable court for a rehearing in the above-entitled cause, the opinion in

which was filed on March 4, 1935. In support of this petition, respondent assigns the following reason:

The decision of this court that the transaction under consideration was a reorganization will have the effect of eliminating the tax. This result would be inconsistent with this court's decision in Worcester Salt Co. v. Commissioner, decided February 18, 1935. In the latter case this court held that bonds are merely an evidence of indebtedness similar to the notes in the case of Pinellas Ice Co. v. Commissioner, 287 U. S. 462. It necessarily follows from this conclusion that bonds are not "securities" within the meaning of the reorganization provision of the revenue act. They constitute "other property" and are subject to taxation. In the instant cases the taxpayer exchanged stock of Alloys solely for stock in Vanadium and bonds of Alloys. Therefore, the transaction comes within the terms of section 203 (d) (1) of the Revenue Act of 1924, which provides that if an exchange would be within the provisions of paragraph (2) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property, then the gain to the recipient should be recognized, but in an amount not in excess of the fair market value of such other property. The principal amount of the bonds of
193 Alloys aggregated $1,161,194.50. Under the terms of section 203 (d) (1), the gain should be recognized in that amount.

Respondent respectfully petitions this honorable court for a rehearing in order that it may be given the benefit of this court's decision in the Worcester Salt case, which was only recently available.

FRANK J. WIDEMAN,
*Assistant Attorney General.*
J. LOUIS MONARCH,
MORTON K. ROTHSCHILD,
*Special Assistants to the Attorney General.*

MARCH 1935.

CERTIFICATE OF COUNSEL

The undersigned, counsel for petitioner, the Commissioner of Internal Revenue, hereby certifies that in his judgment the foregoing Petition is well founded and is not interposed for delay.

FRANK J. WIDEMAN,
*Assistant Attorney General.*

194 In United States Circuit Court of Appeals for the Second Circuit

[Titles omitted.]

*Opinion, per curiam, petitions for rehearing denied*

Filed March 27, 1935

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges

FRANK J. WIDEMAN, ESQ.,
*Asst. Attorney General.*
J. LOUIS MONARCH, ESQ.,
MORTON K. ROTHSCHILD, ESQ.,
*Special Assistants to the Attorney General*

*Circuit Judges.*

195 In United States Circuit Court of Appeals, Second Circuit

JOHN J. WATTS, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

(And two other cases)

*Order denying petition for rehearing.*

Filed March 27, 1935

A petition for a rehearing having been filed herein by counsel for the respondent;

Upon consideration thereof it is

Ordered that said petition be, and hereby is, denied.

WM. PARKIN, *Clerk.*

196 [File endorsement omitted.]

197 [Clerk's certificate to foregoing transcript omitted in printing.]

UNITED STATES OF AMERICA,

198 Supreme Court of the United States

No. 184—October term, 1935

*Order allowing certiorari*

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the

case is assigned for argument immediately following Nos. 175 and 176.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

199 Supreme Court of the United States

No. 185—October term, 1935

*Order allowing certiorari*

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 175 and 176.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

200 Supreme Court of the United States

No. 186—October term, 1935

*Order allowing certiorari*

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 175 and 176.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 39738, 39739, 39740. U. S. Circuit Court of Appeals, Second Circuit. Term No. 184. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. John J. Watts. Term No. 185. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Hugh C. Sicard. Term No 186. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Parker Sloane. Petition for writs of certiorari and exhibit thereto. Filed June 27, 1935. Term Nos. 184 O. T. 1935, 185 O. T. 1935, 186 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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# In the Supreme Court of the United States

OCTOBER TERM, 1935

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No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

*v.*

JOHN J. WATTS

---

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

*v.*

HUGH C. SICARD

---

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

*v.*

PARKER SLOANE

---

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the

United States Circuit Court of Appeals for the Second Circuit entered in the above causes on March 11, 1935, reversing decisions of the Board of Tax Appeals.

### OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 58) is reported in 28 B. T. A. 1056. The opinion of the Circuit Court of Appeals is reported in 75 F. (2d) 981.

### JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 11, 1935. A petition for rehearing was denied on March 27, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

Pursuant to an agreement executed in 1924 with Vanadium Corporation, the three taxpayers, owning all the stock of Alloys Corporation, exchanged their stock for Vanadium stock and short-term bonds to be secured by the assets of Alloys, and to be guaranteed by Vanadium as to principal and interest, with the privilege of paying the principal on 90 days' notice. The Vanadium stock which the taxpayers received in exchange for their Alloys stock was to be held in escrow during the year 1925, and the exact amount to be delivered to the taxpayers would depend on the earning power of

Alloys demonstrated during 1925. Alloys was dissolved in 1928. The questions presented are:

1. Whether the taxpayers are relieved from taxation on the gain realized from the transaction by the exceptions to Section 203 (a) of the Revenue Act of 1924. This depends upon whether the definition of the term "reorganization" contained in Section 203 (h) (1) (A) of the Revenue Act of 1924 should be limited to transactions which partake of the nature of mergers or consolidations.

2. Assuming that the transaction was a reorganization within the meaning of Section 203 (h) (1) (A) of the Revenue Act of 1924, whether the gain realized from the transaction by the taxpayers should be recognized to the extent of the principal amount of the Alloys bonds, namely, $1,161,184.50, under Section 203 (d) (1) of the Revenue Act of 1924. This depends upon whether the bonds are "securities" within the meaning of Section 203 (d) (1) of the Revenue Act of 1924.

## STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 12–16.

## STATEMENT

The facts as found by the Board of Tax Appeals (R. 59–68) may be summarized as follows:

The three taxpayers owned all of the stock of United States Ferro Alloys Corporation, hereafter called Alloys, consisting of 30,000 shares with a par

value of $100 each. On or about December 6, 1924, one of the taxpayers, acting in behalf of the others, as well as himself, entered into a written agreement, with the Vanadium Corporation of America, hereafter referred to as Vanadium. (R. 59–60.)

According to the agreement, the taxpayers agreed to exchange all of their Alloys stock for 66,666⅔ shares of Vanadium, together with bonds aggregating $1,161,184.50 secured by a trust mortgage on the Alloys plant at Niagara Falls and guaranteed as to payment of principal and interest by Vanadium. The mortgage agreement was to provide that Vanadium should always have on hand for the use of the Niagara Falls Plant at least sixty days' supply of such materials and products as might be necessary to employ the power then under contract, and there was to be a clause providing for the privilege of payment of the principal at any time on 90 days' notice. (R. 62–64.) The agreement also provided that upon receipt of the Alloys stock, Vanadium would immediately pay $338,-815.50 to certain creditors of Alloys (R. 64–65).

It was agreed that the contract should be carried out on December 19, 1924, at which time all of the stock of Alloys duly endorsed, together with resignations of the officers and directors of Alloys, should be delivered to Vanadium, and that Vanadium should thereupon place 66,666⅔ shares of its stock in escrow with a trust company, and should deliver to Alloys the bonds described above and immediately pay the amounts it had assumed to

pay under the contract (R. 65–66). The agreement also provided for a complete audit of the business, properties, and profits of Alloys, and the parties agreed that the escrow deposit of Vanadium stock should be dissolved on January 1, 1926, and that the exact number of shares of Vanadium to be then delivered to the taxpayers should be determined on the basis of the earning power of Alloys demonstrated during 1925 (R. 66).

By a supplemental agreement dated December 18, 1924, the amount of stock which Vanadium was to exchange with the taxpayers was reduced to 33,333⅓ shares. The stock of Vanadium was of no par value, and for the purposes of the agreement its value was fixed at $30 per share. The contract was duly executed in accordance with its terms, but as a result of the demonstrated earning power of Alloys during the year 1925 only 32,103 shares of Vanadium were delivered to the taxpayers. Concurrently with the closing of the transaction, Vanadium paid to the creditors of Alloys the sum of $338,815.50. (R. 66.) In July 1928 a certificate of the dissolution of Alloys was filed in the office of the Secretary of the State of New York (R. 67).

In the respective deficiency letters to the three taxpayers, the Commissioner held in substance that the transaction involved was a sale of the 30,000 shares of Alloys for the sum of $2,500,000, and determined that each of the taxpayers derived a capital net gain of $507,534.65 (R. 67–68). The

taxpayers appealed to the Board of Tax Appeals on the ground that the transaction was a tax-free reorganization under Section 203 of the Revenue Act of 1924, and that no gains should be recognized. The Board of Tax Appeals decided, with five members dissenting, in favor of the Commissioner and determined a deficiency of more than $63,000 in the case of each taxpayer for the year 1924.

The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and held that the transaction was a reorganization under the statute and the applicable Treasury regulations. The Commissioner of Internal Revenue filed a petition for rehearing on the ground that the decision of the court in the instant case, in failing to hold that the taxpayers had realized a gain at least to the extent of the value of the bonds received by them in the transaction, was inconsistent with a decision of the same court in *Worcester Salt Co.* v. *Commissioner*, 75 F. (2d) 251, in which it was held that bonds are merely an evidence of indebtedness and are not "securities" within the meaning of the reorganization provision of the Revenue Act. The Circuit Court of Appeals denied the petition for rehearing on March 27, 1935.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the definition of the term "reorganization" contained in Section 203 (h) (1) (A) of the Revenue Act of 1924 should be

limited to transactions which partake of the nature of mergers or consolidations.

2. In giving effect to an administrative construction which is inconsistent with the statute.

3. In denying the petition for rehearing and failing to give effect to its own decision in another case that bonds are not "securities" within the meaning of Section 203 (d) (1) of the Revenue Act of 1924.

4. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The construction placed by the court below upon the reorganization provisions of the Revenue Act of 1924 is inconsistent with the construction placed by this Court upon similar provisions of the Revenue Act of 1926 in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462. Section 203 (h) (1) (A) of the Revenue Acts of 1924 and 1926 defines reorganization as meaning "a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)." In the *Pinellas Ice Co.* case, although one corporation acquired substantially all the properties of another corporation, this Court held that the transaction was not a reorganization within the meaning of the statute because it had

"no real semblance to a merger or consolidation." This Court indicated that while the words within the parentheses in clause A of Section 203 (h) (1) may not be disregarded, they modify the words "merger or consolidation" and may not be considered as sufficient in themselves. In the instant case, the lower court held that the mere acquisition of a majority of the stock of another corporation was sufficient to constitute a reorganization within the meaning of the statute without considering whether the transaction bore a real semblance to a merger or consolidation.

2. For the reasons given above, the decision of the court below is also in conflict with a decision of the Circuit Court of Appeals for the Tenth Circuit in *Prairie Oil & Gas Co.* v. *Motter,* 66 F. (2d) 309; with a decision of the Circuit Court of Appeals for the Eighth Circuit in *Von Weise* v. *Commissioner,* 69 F. (2d) 439, certiorari denied, 292 U. S. 655; with a decision of the Circuit Court of Appeals for the Seventh Circuit in *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696, in which a petition for certiorari has been filed, No. 64, October Term, 1935; and with a decision of the Circuit Court of Appeals for the Fourth Circuit in *G & K Mfg. Co.* v. *Commissioner,* 76 F. (2d) 454. All of these authorities clearly show that the words "merger or consolidation" in clause A may not be disregarded, and that while the parenthetical clause expands the meaning of those words, it is essential that the

transaction partake of the nature of a merger or consolidation.

3. The decision below is believed to be erroneous. The decision of the court below rests upon a Treasury regulation, which cites as an example of a reorganization a case where one corporation acquires a majority of the voting stock and a majority of the total number of shares of all other classes of stock of another. This is merely a repetition of the words in the parentheses of clause A of Section 203 (h) (1). This Court held in the *Pinellas Ice Co.* case, *supra,* that the words in the parentheses expand the meaning of "merger" or "consolidation", but indicated that the transaction must first bear a real semblance to a merger or consolidation. Since that is the proper construction to be placed upon the words of the statute, *a fortiori* a similar construction must be placed upon the corresponding provision of the Treasury regulation. The court below should have inquired whether the transaction bore a real semblance to a merger or cosolidation. The evidence shows that the parties to the transaction intended that Alloys should continue in existence as a separate and independent entity and it was not until four years later that Alloys was dissolved.

The court below also relies upon the principle of legislative sanction of the Treasury regulation, because the Congress reenacted the statutory provision to which the regulation refers. But that

rule of construction has never been applied in a case where the regulation conflicts with the terms of the statute, or with the construction placed upon the statute by this Court.

4. The decision of the court below insofar as it failed to hold that the taxpayers had realized a gain at least to the extent of the value of the bonds received by them in the transaction, is inconsistent with another decision of the same court. A short time prior to the rendering of the decision in the instant case, the court below decided *Worcester Salt Co.* v. *Commissioner,* 75 F. (2d) 251, in which it was held in effect that bonds are not *"securities"* within the meaning of the reorganization provisions of the Revenue Act. This was the first suggestion that a gain upon a reorganization should be recognized when represented by bonds, and the Commissioner of Internal Revenue promptly filed a petition for rehearing in which he contended that he should have the benefit of the *Worcester Salt Co.* decision and that the gain upon the transaction in question should be recognized to the extent of $1,161,184.50, representing the principal amount of Alloys bonds which the taxpayers received in addition to Vanadium stock. In *John A. Nelson Co. v. Commissioner, supra,* it was held that preferred stock does not represent the quality of interest requisite for a reorganization. The Government does not oppose the petition in the *John A. Nelson Co.* case, and if this Court is to pass upon the question whether preferred stock satisfies the

statute, we urge that the similar question concerning bonds should be considered in this case.

5. The question presented is of considerable general importance. The Treasury Department advises that there are a number of cases pending in which the same principles of law are involved.

Wherefore, it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Second Circuit should be granted.

STANLEY REED,
*Solicitor General.*

JUNE 1935.

## APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 258:

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

* * * * *

(b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * *

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at

least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

(U. S. C., Title 26, Sec. 934.)

Treasury Regulations 65, relating to the Revenue Act of 1924:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connec-

tion with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization. If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B. Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B and corporation A distributes as a dividend to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such dividends. (See art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the

stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and the determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See arts. 1596–1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ingnored and both are treated thereafter as if the reorganization had not occurred.

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.) In such cases the gain to the shareholder is recognized and taxed, but in an amount not exceeding the amount of the money or the other property received in connection with the reorganization. If the money so distributed in connection with the reorganization has the effect of the distribution of a taxable dividend, such gain is taxed not as a capital gain but as an ordinary dividend subject to the surtax rates. While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged,

and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

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Nos. 184, 185, 186

# In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

JOHN J. WATTS

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

HUGH C. SICARD

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

PARKER SLOANE

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

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PARKER SLOANE

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The majority, concurring, and dissenting opinions in the United States Board of Tax Appeals

(R. 28–38) are reported in 28 B. T. A. 1056. The opinion of the Circuit Court of Appeals (R. 91–95) is reported in 75 F. (2d) 981.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 11, 1935 (R. 95–96). A petition for rehearing was denied on March 27, 1935 (R. 98). The petition for a writ of certiorari was filed June 27, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

Pursuant to an agreement executed in 1924 with Vanadium Corporation, the three taxpayers, owning all the stock of Alloys Corporation, exchanged their stock for Vanadium stock and short-term bonds to be secured by the assets of Alloys, and to be guaranteed by Vanadium as to principal and interest, with the privilege of paying the principal on 90 days' notice. The Vanadium stock which the taxpayers received in exchange for their Alloys stock was to be held in escrow during the year 1925, and the exact amount to be delivered to the taxpayers would depend on the earning power of Alloys demonstrated during 1925. Alloys was dissolved in 1928. The questions presented are:

1. Whether the taxpayers are relieved from taxation on the gain realized from the transaction by

the exceptions to Section 203 (a) of the Revenue Act of 1924. This depends upon whether the definition of the term "reorganization" contained in Section 203 (h) (1) (A) of the Revenue Act of 1924 should be limited to transactions which partake of the nature of mergers or consolidations.

2. Assuming that the transaction was a reorganization within the meaning of Section 203 (h) (1) (A) of the Revenue Act of 1924, whether the gain realized from the transaction by the taxpayers should be recognized to the extent of the principal amount of the Alloys bonds, namely $1,161,184.50, under Section 203 (d) (1) of the Revenue Act of 1924. This depends upon whether the bonds are "securities" within the meaning of Section 203 (d) (1) of the Revenue Act of 1924.

## STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 24–28.

## STATEMENT

The facts, as found by the Board of Tax Appeals (R. 29–38), may be summarized as follows:

The three taxpayers owned all of the stock of United States Ferro Alloys Corporation, hereafter called "Alloys", consisting of 30,000 shares with a par value of $100 each. On or about December 6, 1924, one of the taxpayers, acting in behalf of the others as well as himself, entered into a written agreement with the Vanadium Corporation of

America, hereafter referred to as "Vanadium" (R. 29–30).

According to the agreement, the taxpayers agreed to exchange all of their Alloys stock for 66,666⅔ shares of Vanadium, together with bonds aggregating $1,161,184.50, secured by a trust mortgage on the Alloys plant at Niagara Falls, New York, and guaranteed as to payment of principal and interest by Vanadium. The mortgage agreement was to provide that Vanadium should always have on hand for the use of the Niagara Falls Plant at least sixty days' supply of such materials and products as might be necessary to employ the power then under contract, and there was to be a clause providing for the privilege of payment of the principal at any time on 90 days' notice (R. 31). The agreement also provided that Vanadium, upon receipt of the Alloys stock, would immediately pay $338,815.50 to certain creditors of Alloys, would satisfy certain other liabilities of Alloys from future earnings of Alloys, and that the taxpayers would assume all other liabilities, for which they agreed to post a bond (R. 32, 57).

It was agreed that the contract should be carried out on December 19, 1924, at which time all of the stock of Alloys duly endorsed, together with resignations of the officers and directors of Alloys, should be delivered to Vanadium, and that Vanadium should thereupon place 66,666⅔ shares of its stock in escrow with a trust company, and should

deliver to Alloys the bonds described above and immediately pay the amounts it had assumed to pay under the contract. The agreement also provided for a complete audit of the business, properties, and profits of Alloys, and the parties agreed that the escrow deposit of Vanadium stock should be dissolved on January 1, 1926, and that the exact number of shares of Vanadium to be then delivered to the taxpayers should be determined on the basis of the earning power of Alloys demonstrated during 1925 (R. 32). By a supplemental agreement dated December 18, 1924, the amount of stock which Vanadium was to exchange with the taxpayers was reduced to 33,333⅓ shares. The stock of Vanadium was of no par value, and for the purposes of the agreement its value was fixed at $30 per share (R. 32).

The contract was duly executed in accordance with its terms, but as a result of the demonstrated earning power of Alloys during the year 1925 only 32,103 shares of Vanadium were delivered to the taxpayers. Concurrently with the closing of the transaction, Vanadium paid to the creditors of Alloys the sum of $338,815.50 (R. 33). In July 1928 a certificate of the dissolution of Alloys was filed in the office of the Secretary of the State of New York (R. 33).

In the respective deficiency letters to the three taxpayers, the Commissioner held in substance that the transaction involved was a sale of the 30,000

shares of Alloys for the sum of $2,500,000, and determined that each of the taxpayers derived a capital net gain of $507,534.65 (R. 33). The taxpayers appealed to the Board of Tax Appeals on the ground that the transaction was a tax-free reorganization under Section 203 of the Revenue Act of 1924 (*infra*, p. 24), and that no gains should be recognized. The Board of Tax Appeals decided, with five members dissenting, in favor of the Commissioner and determined a deficiency of more than $63,000 in the case of each taxpayer for the year 1924 (R. 38, 39).

The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and held that the transaction was a reorganization under the statute and the applicable Treasury Regulations (R. 91–95). The Commissioner of Internal Revenue filed a petition for rehearing on the ground that the decision of the court in the instant case, in failing to hold that the taxpayers had realized a gain at least to the extent of the value of the bonds received by them in the transaction, was inconsistent with a decision of the same court in *Worcester Salt Co.* v. *Commissioner*, 75 F. (2d) 251, in which it was held that bonds are merely an evidence of indebtedness and are not "securities" within the meaning of the reorganization provision of the Revenue Act (R. 96–97). The Circuit Court of Appeals denied the petition for rehearing on March 27, 1935 (R. 98).

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the definition of the term "reorganization" contained in Section 203 (h) (1) (A) of the Revenue Act of 1924 should be limited to transactions which partake of the nature of mergers or consolidations.

2. In giving effect to an administrative construction which is inconsistent with the statute.

3. In denying the petition for rehearing and failing to give effect to its own decision in another case that bonds are not "securities" within the meaning of Section 203 (d) (1) of the Revenue Act of 1924.

4. In reversing the decision of the Board of Tax Appeals.

## SUMMARY OF ARGUMENT

1. The definition of "reorganization" upon which respondents rely is contained in the same parenthetical clause discussed in the brief for petitioner in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Minnesota Tea Company,* No. 174, present term. For the reasons there stated we contend that the definition should be limited to mergers and consolidations or transactions which partake of their nature.

2. The transaction here involved fails to substantially conform to certain basic elements found in mergers and consolidations. Respondents' position was substantially changed as the result of the exchange of their Alloys stock for Alloys bonds

and Vanadium stock. Inasmuch as the bonds do not represent a proprietary interest, respondents *pro tanto* disposed of their proprietorship. There was no plan of reorganization and the only plan shown was between an individual and a corporation. Vanadium merely made an investment in Alloys and had only the rights of a stockholder after the transaction. The two corporations continued their separate activities and the Vanadium Corporation did not assume all the liabilities of Alloys. We submit that the transaction did not partake of the nature of a merger or consolidation.

3. It is settled that the transferor in a reorganization must retain an intimate interest in the business conducted by the transferee. Since the statute provides for the receipt, tax free, only of stock or securities, it appears that the required continuity of interest should be evidenced by the required stock or securities. An exchange of stock for bonds results in a substantial change of position and we think that bonds represent "other property" which is required to be taxed, rather than "securities" which are tax free. Moreover, the bonds in these cases were callable on 90 days' notice, 10% became due within six weeks, and portions of the remainder matured annually over a seven-year period. We think that such bonds represent a method of eliminating the interest of respondents rather than of continuing it.

## ARGUMENT

### I

### THE CLAUSE (A) DEFINITION OF "REORGANIZATION" SHOULD BE RESTRICTED TO TRANSACTIONS WHICH RESULT IN MERGERS OR CONSOLIDATIONS OR PARTAKE OF THEIR NATURE

The general rule of the statute is that the gains upon exchanges are taxable. To this there are certain specifically defined exceptions. Respondents contend that the transaction here involved is literally within the language of one of the exceptions (Section 203 (b) (2), Revenue Act of 1924, *infra*, p. 24), which provides in substance that the gain will not be recognized if stock in a corporation which is a party to a reorganization is exchanged for stock in another corporation which is also a party to the reorganization. Accordingly, the cases turn upon whether the transaction involved was a reorganization within the meaning of the statute. The portion of the definition of reorganization upon which respondents rely is as follows (Section 203 (h) (1)):

> The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation * * *.

The Government contends that the parenthetical language upon which respondents rely is colored and controlled by the words "merger or consolidation" and that to be within the definition a transaction must partake of the nature of a merger or consolidation though it fails to satisfy all of its legal requirements. This contention is fully developed in the brief for petitioner in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Minnesota Tea Company,* No. 174, present term, and Point I of the argument in that case is therefore incorporated herein by reference.

While the transaction in these cases was not a transfer of corporate assets, and there is no overlapping definition in clause (B) dealing directly with a majority stock control of one corporation by another, nevertheless, the portion of the clause (A) definition upon which respondents must rely is a part of the same parenthetical clause discussed in the *Minnesota Tea Company* brief. Therefore, we think that if one portion of the parenthetical clause refers to a transaction resembling a merger or consolidation, it logically follows that another portion of the same parenthetical clause likewise refers to a transaction having a similar resemblance. Therefore, we submit that the argument advanced in Point I of the *Minnesota Tea Company* brief is equally applicable here.

## II

### THE TRANSACTION BETWEEN THE VANADIUM CORPORATION AND AN INDIVIDUAL STOCKHOLDER OF THE ALLOYS CORPORATION DID NOT SUFFICIENTLY PARTAKE OF THE NATURE OF A MERGER OR CONSOLIDATION TO BE TREATED AS A REORGANIZATION

By the transaction here under scrutiny the three stockholders of the Alloys Corporation delivered all of that company's stock to the Vanadium Corporation, receiving in exchange, or as consideration, certain bonds of the Alloys Corporation and certain stock of the Vanadium Corporation. In addition, the Vanadium Corporation agreed to pay certain specified liabilities of the Alloys Corporation and respondents assumed the liability of Alloys for 1924 taxes, which latter item was allowed by petitioner as additional cost of the Alloys stock to respondents (R. 33).

We think that the transaction fails in several particulars to satisfy the statutory requirements: (1) there was no plan of reorganization; (2) the transaction was not one between two or more corporations; (3) both the Vanadium Corporation and the Alloys Corporation remained in existence after the transaction; (4) the proportion of stock to other property received as consideration or in exchange was so small that respondents' proprietary interests were substantially changed; (5) the Vanadium Corporation did not assume all of the liabilities of Alloys.

We shall briefly discuss each of the points enumerated above:

(1) The record shows that the transaction occurred as the result of an agreement between the respondent Sloane, acting individually and as trustee, as party of the first part, and Vanadium Corporation as party of the second part (R. 55), whereby the Vanadium Corporation was to acquire all of the capital stock of Alloys Corporation. The Alloys Corporation acquired nothing as a result of the transfer. Neither did it give up anything. The Alloys Corporation was simply the subject matter of the agreement. The Vanadium Corporation acquired a wholly owned subsidiary which it did not absorb and which remained wholly independent as a separate corporation. The agreement did not contemplate that the Vanadium Corporation should succeed as a corporation to the estate, property, rights, privileges, and franchises of Alloys, but merely that Vanadium should own the stock of Alloys. Unless a literal application of the statutory language is consonant with its purpose, we submit that the plan was not a plan of reorganization.

(2) The transaction was consummated by respondent Sloane and the Vanadium Corporation. It was not a transaction between two corporations. Under Section 203 (b) (2) of the Revenue Act of 1924, upon which respondents rely, the Alloys Corporation should have been a party to the reorganization, and since it did not participate in the trans-

action, we submit that respondents' claim should fail. It is true that section 203 (h) (2) provides that the term "a party to a reorganization" includes both corporations in the case of an acquisition by one corporation of at least a majority of the stock of another corporation, but this does not necessarily indicate that a corporation may be "a party to a reorganization" without even participating in it. It seems incredible that the statute was intended to apply to a situation where one corporation acquires a majority of another corporation's stock through independent arrangements with the individual stockholders of the acquired corporation, and we therefore submit that the statute contemplates that both corporations shall be participants in the transaction. Respondent Sloane was acting for himself and as trustee for the other respondents. But under the agreement it was expressly understood that Vanadium had no obligation to recognize anyone other than respondent Sloane and had no duty with respect to the application of the consideration by respondent Sloane (R. 64). Therefore, it appears that the Vanadium Corporation and Sloane individually were the only active participants in the transaction, and, while Sloane undertook to deliver all of the Alloys stock, Vanadium did not propose to deal with anyone but him. The agreement seems to limit the parties to Sloane and Vanadium.

(3) After the transaction, Alloys and Vanadium existed at the same time, pursuing their separate activities. Vanadium undertook to keep available for the use of Alloys at least a 60 days' supply of such material and products as might be necessary to employ the power for which Alloys had already contracted (R. 59). Vanadium undertook to pay two specific creditors of Alloys, and after the payments were made Vanadium appeared on the books of Alloys as a creditor to the extent of $338,000 (R. 33). Part of the consideration paid to respondents for the Alloys stock transferred to Vanadium consisted of certain bonds of Alloys of which a definite portion of the principal amount became due annually from February 1, 1925, to January 1, 1932, inclusive (R. 59). At the time of the transaction it was thus obviously intended that both corporations should continue to exist, and it was not a part of the plan that Alloys should be dissolved after winding up its affairs. Although Alloys was dissolved in 1928 (R. 33), this was not a part of the plan in 1924, and has no effect upon the question here presented. The statute does not deal with a mere association of coexisting corporations, but with a continuing business in a new form. For the reasons more fully explained in the *Minnesota Tea Company* brief, we submit that the transaction here involved fails to meet this important requirement.

(4) The net consideration for the transfer of Alloys' stock to Vanadium was $2,080,911.42. Of this amount $1,161,184.50 consisted of bonds. In addition, payments were made by Vanadium to two creditors of Alloys in the total amount of $338,-815.50 (R. 33). Furthermore, the agreement contained a provision whereby $500,000 in cash would have been paid by Vanadium if the 1925 earnings of Alloys had justified it (R. 66). Since the only part of the consideration which represented property of a similar character to that transferred by the respondents was the $963,090 in Vanadium stock,[1] it can be seen that the proportion of the consideration which consisted of stock was less than 50%. Accordingly, by this transaction respondents transferred a 100% proprietary interest in the Alloys Corporation, but did not receive a proprietary interest in the Vanadium Corporation substantially equivalent to the value of the Alloys stock. We submit that this does not represent a mere change in the form of the respondents' investment, *but that they had, in effect,* permanently disposed of a large proportion of their proprietary interest and had, *pro tanto,* radically changed their position. In the *Minnesota Tea Company* brief we have contended that a corporation which transfers its assets in connection with a transaction which is

[1] $1,000,000 less $36,910, the value of the undelivered stock (R. 33).

recognized by the statute as a reorganization must preserve its proprietary interest in the assets transferred by retaining a continuity of interest which is the substantial equivalent of the property transferred. We think that the same principle is applicable to transactions under the portion of the clause (A) definition which is here involved, and for the reasons given in the *Minnesota Tea* brief we submit that the respondents did not preserve a sufficient proportion of proprietary interest to satisfy the statute. If the continuity of interest which is required of a corporation as a result of the decision in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462, it to be subject to close scrutiny in determining whether a formal or a substantial change has occurred, we submit that the failure of the Alloys Corporation to participate in the transfer in these cases does not eliminate that necessity.

(5) As pointed out in the *Minnesota Tea Company* brief, it is one of the indicia of a merger or consolidation as distinguished from a sale that the surviving corporation undertake to assume the liabilities of the predecessor corporations. With the exception of specific items of $255,000 and $338,815.50, it appears that respondents, and not the Vanadium Corporation, assumed the liabilities of the Alloys Corporation (R. 57, 62–63).

For the above reasons, we submit that the transaction in question was not a reorganization.

The Circuit Court of Appeals fell into the error of applying the statute literally. It said (R. 92):

> The controlling facts may be stated in one sentence. The petitioners [respondents] exchanged all of the stock of Alloys solely for stock in Vanadium and bonds of Alloys.

These are not the only controlling facts, we submit, if there is to be an adherence to the broad principles which actuated Congress in enacting the reorganization provisions. The intention of Congress to relieve from the tax those transactions which resulted only in a change of form led to the proposal to postpone the tax in cases of mergers or consolidations. The other provisions of the clause (A) definition were not written with any different purpose, but merely to extend the statute to similar transactions. The statute deals in clause (A) with mergers or consolidations; in clause (B) with transfers of assets to a controlled subsidiary; in clause (C) with recapitalizations; and in clause (D) with mere changes in identity, form, or place of organization. Unless the parenthetical language of clause (A) be an exception, the entire definition of reorganizations deals with transactions which involve mere formal changes. This Court has held that the definition may not be applied literally, but that where one corporation transfers its assets it must retain its interest therein. We think that the structure of the statute reflects the purpose to re-

strict its benefits and that it is implicit that substantial changes are beyond its purview. The experience of the Treasury shows that the statute is open to abuse if its provisions are applied with precision to sales which take the technical form of reorganizations.

The decision of the Circuit Court of Appeals, insofar as it relies upon the administrative practice and accepts literally Example (3) in Article 1574 of Regulations 65 (*infra*, p. 26), covering "sales", is at variance with its prior holding in *Cortland Specialty Co.* v. *Commissioner*, 60 F. (2d) 937. The Circuit Court of Appeals failed to note that the regulations emphasize that the statute is dealing with corporate reorganizations "which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations," and it failed to heed the cautionary statement that "the statute does not allow the use of reorganizations to avoid tax."

The Circuit Court of Appeals was in error in stating that the definition of reorganization was reenacted without change in the Revenue Act of 1924 (R. 94), and it failed to appreciate that a literal construction of the statute could not be supported after the Revenue Act of 1924 introduced the definition in clause (B). At this point we desire to incorporate the discussion in the *Minnesota Tea* brief (pp. 29–31) with respect to the administrative prac-

tice, as well as the matter in Appendix B to that brief.

We submit that the Circuit Court of Appeals erred in failing to give consideration to the question whether the transaction partook of the nature of a merger or consolidation. We submit further that measured by such a test the transaction here involved fails to satisfy the statute.

## III

### THE GAIN UPON THE TRANSACTION WAS TAXABLE, AT LEAST TO THE EXTENT OF THE PRINCIPAL AMOUNT OF THE BONDS

If the construction of the statute for which we contend be adopted, and it be held that the transaction here involved did not partake of the nature of a merger or consolidation, it will be unnecessary to consider this question. But, assuming that the transaction is within the statute, we contend that the decisions of the court below should be reversed upon the independent ground that the Alloys Corporation bonds were not "stock or securities" within the meaning of Section 203 (b) (2), Revenue Act of 1924 (*infra*, p. 24).

The only kind of property which is relieved from taxation is stock or securities. If the consideration for the transfer consists of "other property or money", Section 203 (d) requires that the gain be recognized and taxed to that extent. This Court has held in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S.

462,470, that the transferor must retain a continuing interest in the affairs of the "purchasing company more definite than that incident to ownership of its short-term purchase-money notes." Since stock or securities are the classes of property specifically exempted, it is logical to assume that the required continuity of interest should be represented by such property exclusively. Clearly the Alloys bonds are not stock, and we think they do not constitute "securities" within the meaning of the statute.

We appreciate that corporate bonds are commonly regarded as securities under statutes designed for different purposes. But the question here is whether Congress intended to ignore for tax purposes an exchange of stock in the Alloys Corporation for bonds of the Alloys Corporation. Such a transaction is ordinarily treated as resulting in a substantial change of position and it is significant that Section 203 (b) (1), dealing with tax-free exchanges not accomplished through reorganizations requires that common stock be exchanged for common stock and that preferred stock be exchanged for preferred stock. In the present case it would seem clear that respondents have substantially changed their position from investors with funds at the risk of the business to creditors with a lien upon the assets. The notes in the *Pinellas* case, *supra,* were secured by a first lien on the property conveyed, but this Court held

such notes did not represent the prescribed continuity of interest. We think the same rule is applicable here. The fact that the bonds were callable at any time on 90 days' notice (R. 59) is another similarity to the short-term notes in the *Pinellas* case. The agreement between the parties was to be carried out on December 23, 1924 (R. 60), and $161,184.50 of the principal amount of the bonds became due and payable February 1, 1925 (R. 59). It is difficult to conceive of such bonds representing a continuity of interest. Moreover, definite portions of the remaining bonds became due annually until January 1, 1932, and we submit that instead of representing a continuity of interest the bonds represent the means of eliminating respondents' interests.

In *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696 (C. C. A. 7th), now pending on writ of certiorari, No. 61, present term, where a corporation transferred its assets in consideration for cash and preferred stock, it was held that the preferred stock, which was nonvoting, did not represent a voice in the control of the new corporation and did not preserve the required continuity of interest. If a transfer of assets for preferred stock does not preserve a continuity of interest, we submit that, *a fortiori,* an exchange of common stock for bonds does not satisfy the statute. Unlike preferred stock, bonds do not represent even a proprietary interest in the business.

Our argument does not leave the term "securities" without a meaning. It occurs in the phrase "stock or securities", and we think the statute refers to securities having similar attributes to stock. The term probably includes stock rights and stock warrants which may be converted into stock at the option of the holder.

The court below has itself held that bonds are merely an evidence of indebtedness which represent no continuity of interest. *Worcester Salt Co.* v. *Commissioner,* 75 F. (2d) 251. If bonds do not represent a continuity of interest, we submit that they cannot be deemed to be "securities." Since a transfer may be a reorganization where the consideration consists solely of stock or securities (Section 203 (b) (2)), it seems to follow that the required continuity of interest is represented by the required stock or securities.

If the bonds are not "securities" within the meaning of Section 203 (b) (2), they must constitute "other property" within the meaning of Section 203 (d), and the gain should be recognized to the extent of the value of the bonds ($1,161,194.50), which is less than the total profit (R. 33).

## CONCLUSION

We submit that the decisions below should be reversed, either upon the ground that the transaction did not constitute a reorganization, or, upon

the alternative ground, that in any event the bonds are not securities within the meaning of the statute.

Respectfully submitted.

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NOVEMBER 1935.

# APPENDIX

## STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 256:

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4)

of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * * *

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 65, relating to the Revenue Act of 1924:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially effect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization. If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B. Furthermore, if the reorganization is accomplished

by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B and corporation A distributes as a dividend to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such dividends. (See art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and the determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See arts. 1596–1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ignored and both are treated thereafter as if the reorganization had not occurred.

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.) In such cases the gain to the shareholder is recognized and taxed, but in an amount not exceeding the amount of the money or the other property received in connection with the reorganization. If the money so distributed in connection with the

reorganization has the effect of the distribution of a taxable dividend, such gain is taxed not as a capital gain but as an ordinary dividend subject to the surtax rates. While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock of property received or exchanged.

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CHARLES ELMORE CROPLEY
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IN THE

# Supreme Court of the United States

**October Term, 1935**

**Nos. 184-186**

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

*v.*

JOHN J. WATTS.

---

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

*v.*

HUGH C. SICARD.

---

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

*v.*

PARKER SLOANE.

---

## BRIEF FOR RESPONDENTS IN OPPOSITION ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

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August 17, 1935.

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IN THE

# Supreme Court of the United States

**October Term, 1935**

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|---|---|
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| GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*, v. HUGH C. SICARD. | No. 185 |
| GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*, v. PARKER SLOANE. | No. 186 |

## BRIEF FOR RESPONDENTS IN OPPOSITION ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

[Italics and bracketed matter in quotations ours unless otherwise noted.]

### Opinions Below.

The opinion of the Board of Tax Appeals (R. 58) is reported in 28 B. T. A. 1056. The opinion of the Circuit Court of Appeals is reported in 75 F. (2d) 981.

## Jurisdiction.

The judgments of the Circuit Court of Appeals, were entered on March 11, 1935. A petition for rehearing was denied on March 27, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## Questions Presented.

The Government has not in our view correctly stated the questions in the case. They are:

1. Does a transaction by which the taxpayers "exchanged all of the stock of Alloys [Corporation] solely for stock in Vanadium [Corporation] and bonds of Alloys"* constitute the "acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"? Such acquisition is a type of transaction which the term "reorganization" is defined by Section 203 (h) (1) (A) of the Revenue Act of 1924 to include. Or is the dissolution of Alloys an additional factor indispensable if the transaction is to qualify as a reorganization?

The Court below held that the transaction did constitute a reorganization within the quoted definition, dissolution not being necessary.

2. If in a reorganization the taxpayer receives stock and mortgage bonds in exchange for all of a corporation's stock, has he, in so far as the mortgage bonds are concerned, received "stock or securities"?

Section 203 (b) (2) of the Revenue Act of 1924 provides that no gain or loss is to be recognized in "stock or se-

* Quoting from the "single sentence" with which the Circuit Court of Appeals said the "controlling facts" might be stated (R. 182).

curities" received in exchange for "stock or securities" in a reorganization. The Government asserts that an exchange of stock for stock and mortgage bonds is not, to the extent that mortgage bonds are received, an exchange for "stock or securities", and consequently that the mortgage bonds, even if not the stock, should be treated as "gain". This contention was made for the first time in a petition for rehearing in the Court below. The petition was denied without opinion.

## Statement.

The facts are stated in the opinion of the Court below and in the Government's petition. A relevant fact, not there stated, is that Mr. Sloane, one of the taxpayers, became a member of the Board of Directors and of the Executive Committee of Vanadium Corporation as part of the transaction (R. 130).

**The decision that there was here a "reorganization" as defined by Section 203 (h) (1) (A), notwithstanding that Alloys was not dissolved, is in complete harmony with the language of this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, which nowhere suggests, much less decides, that dissolution is required. The decision here moreover follows an administrative construction deliberately sanctioned by Congress. Despite contrary statements in the petition its opinion shows that the Court below gave full consideration to the obvious fact that the transaction in this case did partake of the nature of a merger or consolidation.**

In the Court below the Government contended that because the Alloys Corporation had not been dissolved the

transaction here at issue failed to constitute a "reorganization" within the statutory definition. Such had been the holding of the Board of Tax Appeals. That issue the Court below considered and decided.

In its petition here the Government fails to emphasize the lack of dissolution, but instead asserts that the Court below did not give heed to the broad principle of the decision of this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, that to qualify as a "reorganization" the transaction must bear "real semblance to a merger or a consolidation", and must "partake of the nature of a merger or a consolidation", phrases used by this Court in its opinion in the *Pinellas* case.

This presentation is misleading. No such question was presented to the Court below. Parties and counsel assumed that the principle of the *Pinellas* case was controlling. It would have indeed been strange had any other assumption been made especially as the broad principle adopted in the construction of the statute by this Court in the *Pinellas* case had already been advanced by the Circuit Court of Appeals of the Second Circuit in *Cortland Specialty Co.* v. *Commissioner*, 60 F. ((2d) 937, a case cited and approved by this Court in the *Pinellas* case.

Although the Circuit Court of Appeals did not set out to determine whether the transaction bore "real semblance to a merger or consolidation" *in haec verba* it did consider at length the effect of failure to dissolve the corporation the stock of which was acquired—the only respect in which the Board of Tax Appeals had found, and the Government claimed, that the transaction failed to constitute a "reorganization" within the statutory definition.

The *Pinellas* case did not make, "Was there semblance to a merger or consolidation?" words of art to which every court must address itself. The Court below necessarily

held in effect that there was semblance to a merger or a consolidation here.

A brief examination of the *Pinellas* case will show that there is no inconsistency between that decision and this.

The Act of 1924, Section 203 (h), at issue here, provides:

> "As used in this section and sections 201 and 204—
>
> (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation) • • •."

This Court said of similar provisions in the 1926 Act in the *Pinellas* case (at 287 U. S. 469-470):

> "The words within the parenthesis may not be disregarded. *They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of these words*—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation."

It seems too clear for argument that by these words this Court intended simply to characterize the type of transactions described by the words in parenthesis as "partak(ing) of the nature of a merger or consolidation". The Court adverted to the obvious fact that:

> "the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"

intrinsically does "partake of the nature of a merger or consolidation", as does the acquisition of *all* of another corporation's stock in the instant case; it did not intend to require that there be some unstated additional factor, such as dissolution in order that the transaction might qualify as a "reorganization".

The true basis of the Court's decision in the *Pinellas* case was not (h) (1) (A) of Section 203. This Court commented on the words in parenthesis in (h) (1) (A) to correct a misconstruction of that clause by the lower Court in that case, saying "if passed without comment may produce perplexity" (287 U. S. 469). The statute actually controlling in the *Pinellas* case was Section 203 (b) (3) in the 1926 Act, as follows:

> "No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization solely for stock or securities * * *."

In the *Pinellas* case the taxpayer had received short term notes. This Court said (at 287 U. S. 468-469):

> "These notes—mere evidence of obligation to pay the purchase price—*were not securities within the intendment of the act* and were properly regarded as the equivalent of cash * * *. In substance the petitioner sold for the equivalent of cash; *the gain must be recognized.*"

The Court proceeded to make the comment on Section 203 (h) (1) (A) quoted on the preceding page of this brief and continued (at 287 U. S. 470):

> "But the mere purchase for money of the assets of one Company by another is beyond the evident

> purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes."

The Court then approved the opinion in *Cortland Specialty Co.* v. *Commissioner*, 60 F. (2d) 937, 939, 940, There the Court had said (at p. 940):

> "The very reason that Section 203 (e)* requires that some of the property received in exchange should be '*stock or securities*' [italics by the Court] is to deprive a mere sale for cash of the benefits of an exemption and to require an amalgamation of the existing interests * * * The word 'securities' was used so as not to defeat the exemption in cases where the interest of the transferor was carried over to the new corporation in some form".

These quotations show that the *Pinellas* case turned on the requirement that property received in exchange must be "stock or securities". The Court not only failed to require that there be some additional factor, such as dissolution, in connection with an acquisition, but it explicitly condemned the holding of the lower court in that case that there must be a "merger or a consolidation" in the "ordinary and commonly accepted meaning of those words" (287 U. S. 470).

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* Meaning the 1926 Act which also ruled in the *Pinellas* case. A similar provision is in the 1924 Act which rules in the instant case.

**The Court below has followed an administrative construction deliberately sanctioned by Congress in the reenactment of the statute.**

The statute is not ambiguous. The Court below demonstrates that its decision follows a continuous administrative construction of many years which has thereby become embodied in the law. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466-467; *Helvering* v. *Bliss*, 293 U. S. 144, 151.

## There Is No Conflict Between Circuits.

The Government asserts that the decision of the Circuit Court of Appeals in the instant case conflicts with various decisions by other Circuit Courts of Appeals. The basis of the alleged conflict is what the Government regards as the failure of the Court below to give effect to the doctrine of the *Pinellas* case. If the Court below has given effect to that doctrine, there is, therefore, no conflict even on the Government's own statement.

There is no conceivable difference between the Circuits as to the principle to be applied in these cases—the alleged "conflicts" relate to the application of a principle accepted by all to diverse and individual facts. As the doctrine of the *Pinellas* case found precedent in the decision of the Second Circuit Court of Appeals in the *Cortland Specialty* case, specifically approved and followed by this Court in the *Pinellas* case, it can hardly be argued the Court below does not recognize that doctrine.

Four cases are cited as conflicting. In the *Prairie* case the Court held that a sale of property for cash did not meet the definition of reorganization in Section 203 (h) (1) (A).

It was obviously not an exchange of stock for "stock or securities" (Section 203 [b] [2]) as in the instant case (*Prairie Oil & Gas Co.* v. *Motter*, 66 F. [2d] 309 [C. C. A. 10]). In the *Von Weise* case, the Court found that all of the common stock, but not a majority of all other classes of stock, had been acquired so that the acquisition did not effect a reorganization within the terms of Section 203 (h) (1) (A) (*Von Weise* v. *Commissioner*, 69 F. [2d] 439 [C. C. A. 8th]). In the *Nelson* case, the Court held that cash and non-voting preferred stock, received in exchange for property, did not effect a reorganization, for it did not provide the recipient with the requisite "interest in the affairs of purchasing company" (*John A. Nelson Co.* v. *Commissioner*, 75 F. [2d] 696 [C. C. A. 7th]). In the *G. & K.* case, the Court held there was no merger or consolidation and that "substantially all" the properties of a corporation had not been acquired (Section 203 [h] [1] [A]) because the corporation had been left with substantial assets (*G. & K. Mfg. Co.* v. *Commissioner*, 76 F. [2d] 454 [C. C. A. 4th]). In none of these cases was it held that dissolution of the absorbed corporation was prerequisite to a "reorganization". Not only the principle but the result of these cases is in every sense consistent with the decision here.

## Stock and Mortgage Bonds Are "Stock or Securities".

The Government urges that the transaction here at issue be unscrambled and the bonds, even if not the stock, be taxed as not being "securities" within Section 203 (b) (2). The decision of the Second Circuit Court of Appeals in

*Worcester Salt Co.* v. *Commissioner*, 75 F. (2d) 251, is urged as authority for that procedure. The Court nowhere in its opinion in the *Worcester Salt* case holds that bonds are not "securities"; it concluded on the complex and special facts of that case that the transaction amounted to a purchase. As the *Worcester Salt* case was decided two weeks before the instant case by the same Court, as Judges MANTON and A. N. HAND (the author of the *Cortland Specialty* opinion) participated in both decisions, and as the Court in the instant case denied a petition for rehearing based upon alleged inconsistency with the *Worcester Salt* case, it is abundantly plain that the Court below, at any rate, could find no such inconsistency.

Here the taxpayers, stockholders in Alloys, transferred to Vanadium all of the stock in Alloys for stock in Vanadium and mortgage bonds of Alloys. Unquestionably there was an exchange of stock for "stock or securities" resulting in "interest in the affairs of the purchasing company" (287 U. S. 470—*Pinellas* case) and "amalgamation of the existing interests" (60 F. [2d] 940—*Cortland Specialty* case), an "interest" and "amalgamation" emphasized by Mr. Sloane's becoming a director and a member of the Executive Committee of Vanadium. The strict provisions of the indenture securing the bonds comply fully with the meaning of the word "securities". The property received was precisely what the statute contemplated.

## *Conclusion.*

The statute has already received the authoritative construction of this Court. The Second Circuit Court of Appeals has pronounced no principle, novel, or important, or inconsistent with any decision of this Court. Indeed it was the construction of the statute by the Second Circuit Court of Appeals in the *Cortland Specialty* case that was accepted and approved by this Court in the *Pinellas* case. The dispute here, and the alleged conflict with other circuits, turn only on the application of an accepted principle to highly diverse and specialized factual situations. The application of that principle here by the Court below has the further support of an administrative construction of long standing to approve of which the statute was intentionally designed. The petitions for writs of certiorari should be denied.

Dated, New York, August 17, 1935.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**October Term, 1935**

| | |
|---|---|
| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*, *against* JOHN J. WATTS, *Respondent*. | No. 184 |
| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*, *against* HUGH C. SICARD, *Respondent*. | No. 185 |
| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*, *against* PARKER SLOANE, *Respondent*. | No. 186 |

## RESPONDENTS' BRIEF.

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SAMUEL SEABURY,
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IN THE

# Supreme Court of the United States

**October Term, 1935**

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| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner,* *against* JOHN J. WATTS, *Respondent.* | No. 184 |
| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner,* *against* HUGH C. SICARD, *Respondent.* | No. 185 |
| GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner,* *against* PARKER SLOANE, *Respondent.* | No. 186 |

## RESPONDENTS' BRIEF.

(Italics and bracketed matter in quotations ours unless otherwise noted.)

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### Opinion Below.

The Opinion of the Court below is reported in 75 F. (2), at page 981, and is found at pages 91-95 of the Record. The Opinion of the United States Board of Tax Appeals (R. 28-38) is reported in 28 B. T. A. 1056.

## Jurisdiction.

The cases are here on writs of certiorari. Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended.

## Question Presented.

The question presented is whether or not gain or loss in the transaction described below should be recognized for income tax purposes in the year in which the transaction occurred. The answer depends upon whether or not the transaction was a "Reorganization" within the meaning of Section 203 (h) (1) of the Revenue Act of 1924.

## Statement of the Case.

The respondents were all the stockholders of United States Ferro Alloys Corporation, hereinafter called "Alloys" (R. 29). On December 6, 1924, the respondent Sloane, acting for all three, entered into an agreement with Vanadium Corporation of America, hereinafter called "Vanadium" (R. 51, 55). By this agreement Sloane

"does hereby exchange, transfer, and deliver"

to Vanadium 30,000 shares, constituting the total capital stock, of Alloys, and agrees to deliver to Vanadium the resignations of all the officers and directors of Alloys (R. 58). In return, Vanadium

"does hereby exchange, transfer, and deliver"

to Sloane 66,666⅔ [subsequently reduced to 32,103 (R. 54)] shares of Vanadium stock and $1,161,184.50 face amount of bonds of Alloys. These bonds matured, according to their

terms, in substantially equal amounts annually over a period of eight years commencing February 1, 1925, subject to call on ninety days' notice. They were secured by a trust mortgage on Alloys' land, plant and equipment at Niagara Falls and, by the terms of the agreement, the payment of principal and interest was guaranteed by Vanadium (R. 58-59).

Vanadium agreed to repay certain creditors of Alloys $338,815.50 advanced by them on chrome contracts and for unused power (R. 56, 57-58) and assumed the payment of other liabilities of Alloys for materials delivered, labor, expenses, etc., aggregating $255,000 (R. 57). Sloane, one of the respondents, "in consideration of the exchange of the said stock" agreed to become a Director and a member of the Executive Committee of Vanadium (R. 64).

The agreement was duly executed according to its terms (R. 54): Vanadium acquired all the stock of Alloys, giving in exchange shares of its own stock and mortgage bonds of Alloys, and Sloane joined the Board of Directors and the Executive Committee of Vanadium. Vanadium, as agreed, assumed the payment of the aforesaid liabilities of Alloys and made the payments it agreed to make to creditors of Alloys, and thereupon Vanadium became a creditor of Alloys in the amount so paid (R. 51). It was stipulated (R. 54) that these payments were not income to respondents.

In their Income Tax Returns for 1924, respondents treated the foregoing transaction as a Reorganization, the gain or loss on which was postponed for tax purposes by the provisions of Section 203 (b) (2) of the prevailing Revenue Act. The Commissioner, however, proposed to recognize a gain and to assess a tax deficiency against respondents. They filed appeals to the Board of Tax Appeals and the proceedings were consolidated for hearing and decision (R. 28). The Board of Tax

Appeals, five members dissenting, sustained the Commissioner (R. 28-41). On appeal the decision of the Board of Tax Appeals was reversed [75 F. (2) 981], and the Commissioner applied for, and obtained, writs of certiorari from this Court.

## Summary of Argument.

The transaction here involved is within the express terms of the statute [Revenue Act 1924, Sec. 203 (b) (2)], which provides that

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

The transaction here involved is also within the spirit of the statute: there is no claim or even suggestion that it was a device to avoid taxation, or that it was a sale masquerading as a reorganization, or that it was conceived or consummated for any purpose except the advancement of the legitimate corporate purposes of the corporations concerned.

This case is governed by the Revenue Act of 1924. The historical development of the statute shows that in 1924 Congress re-enacted the pre-existing statute without change, insofar as it affects this case, although the departmental regulations previously promulgated had, in express and clear language, defined just such a transaction as this as a reorganization within the statute. Such re-enactment, in the light of the administrative interpretation, gives the interpretation the force of law.

The cases relied on by petitioner are not in point. They dealt with transactions in which one or more of the follow-

ing elements have been held or are claimed to take the case out of the terms of the statute:

(a) A sale for cash or cash and promissory notes of the purchaser;

(b) a transfer of stock which constituted less than a majority of each class of stock of the corporation;

(c) a transfer of assets which were not all or substantially all the property of the corporation;

(d) a transfer which was merely a bookkeeping transaction between a corporation and its wholly owned subsidiary.

In our case the transaction involved *all* the stock of Alloys; there was not a sale, but an exchange; no part of the property received on the exchange was cash, but all of it was stock or securities; the transaction was between strangers and not subsidiaries, and it was a *bona fide* transaction for the advancement of the legitimate corporate purposes of the two corporations concerned.

## POINT I.

**The transaction here involved falls within the express words of the statute. It is also within the spirit of the statute, having been consummated solely for the purpose of carrying out legitimate corporate purposes. Hence the transaction constituted a reorganization under the statute.**

The Revenue Act of 1924 provided [Sec. 202 (d)]:

> "In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of Section 203."

Section 203 (b) (2) provided:

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

The question presented is: Was the transaction here involved a "Reorganization"?

The statute itself points the answer. Section 203 (h) (1) provided:

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or * * *."

It is settled by the decisions of this Court:

(1) "The words within the parentheses may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." (*Pinellas Ice Company* v. *Commissioner*, 287 U. S. 462, 469-470.)

(2) Even though a transaction is within the dictionary meaning of the terms of the statute, the question remains whether it is or is not

> "* * * an operation having no business or corporate purpose—a mere device which put on the form

> of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares • • •."

If

> "the whole undertaking, though conducted according to the terms of [the statute], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else,"

the statute does not apply to it. (*Gregory* v. *Helvering*, 293 U. S. 465, 469, 470.)

(3) If, on the other hand, the transaction is not a device to transfer property, masquerading as a reorganization, the statute is controlling:

> "• • • the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'" (*Crooks* v. *Harrelson*, 282 U. S. 55, 61.)

There is no claim that this transaction was a device to dodge taxes, or that it was not undertaken for purposes germane to the conduct of the businesses of the corporations concerned, or that it was a conveyance masquerading as a corporate reorganization. On the contrary, it has never been disputed that all parties believed it would be a commercial advantage to both corporations, and in furtherance of their legitimate corporate purposes, to have Vanadium take over the business of Alloys and that it was for this reason, and none other, that the transaction was conceived and consummated. In such circumstances, the transaction is within the spirit, as well as the letter, of Section 203 (h) (1) and any gain therefrom is not to be recognized for income tax purposes until such later time as the property received on the exchange is disposed of.

**Petitioner's Contentions.**

In the Court below petitioner admitted in his brief:

> "In the instant case the transaction comes within the parenthetical clause of A"—

referring to subdivision "A" of Section 203 (h) (1). Petitioner argued, however, that the transaction was not a reorganization because

> "• • • there is nothing in the agreement or elsewhere in the record to indicate that they intended that Alloys should be dissolved, or merged with Vanadium, or that a new corporation should be created to take over the assets of Alloys and Vanadium."

Thus, although it was admitted that the transaction is within the terms of the statute, petitioner claimed that the statute should not be given effect because the agreement did not

provide for the dissolution of Alloys. This claim is now reasserted (Petitioner's Brief, pp. 11, 14).

The provisions of the statute itself, as well as its historical development, show that dissolution is not a necessary element of reorganization in such a transaction as this one.

In the first place, the statute, by its terms, makes no provision for dissolution. The Court should not add a condition which Congress has omitted (*Crooks* v. *Harrelson*, 282 U. S. 55, 61; *U. S.* v. *Goldenberg*, 168 U. S. 95, 102-103).

Secondly, the Act expressly provides that the transfer of a *mere majority* of the stock of a corporation may constitute a reorganization. Yet Congress must have known that it requires the concurrence of *more* than a majority of the stock to effect a dissolution, so that neither the transferror nor the transferee of a mere majority of the stock could undertake that dissolution would follow. Consequently, Congress could not have intended to make dissolution a necessary element of reorganization.

Thirdly, a consideration of the history of the reorganization provisions and of their interpretation in the Regulations of the Treasury Department, shows that in certain cases dissolution is deemed a requisite by the Department and in others it is not; and that the transaction here involved is in the latter, and not the former, category. This case arises under the 1924 Act. The Regulations, as originally issued by the Treasury Department under the 1918 Act (Reg. 45, Art. 1567, *infra*, p. 23) described the forms of reorganization under the statute as follows:

> "(a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dis-

solution of B, or (d) the merger of B into A or (e) the consolidation of the corporations."

It will be observed that only in the cases of (a), (b) and (c) was dissolution stated to be a requirement. Even that condition, however, prevailed only for a period of about five months, when, by Treasury Decision 2924 (*infra*, pp. 29-30), the requirement of dissolution was eliminated in those cases falling under (c) wherein *all* of the stock of another corporation was acquired, as is the fact in the instant case. This followed from the fact that there was added to the regulation the provision (see *infra*, p. 30) that in cases where the transferee corporation became obliged, by virtue of Section 240 (b) of the Statute and Article 633, to file a consolidated return for itself and the corporation whose stock it acquired, *i. e.*, where the former acquired *all* of the stock of the latter, such a transaction should be deemed a reorganization. Such recognition that a consolidated return would be required *after the reorganization* shows that it was contemplated that both corporations would continue in business and that neither of the corporations would be dissolved in the transaction.

In the Regulations issued under the 1921 Act [Reg. 62, Art. 1566 (b) *infra*, p. 24], the forms of reorganization were described thus:

> "(1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corpora-

> tion A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

It will be observed that what were Subdivisions (b) and (c) in the 1918 regulations became Subdivisions (2) and (3) in the 1921 regulations, BUT THAT THE PROVISIONS FOR DISSOLUTION, WHICH WERE PART OF (b) AND (c) IN 1918, WERE DROPPED WHEN THEY BECAME (2) AND (3) IN 1921; FURTHER, THAT A SUBDIVISION KNOWN AS (6) WAS ADDED IN 1921, WHICH EXPRESSLY COVERS THE PRESENT CASE, AND WHICH CONTAINS NO PROVISION FOR DISSOLUTION.

After these administrative interpretations had been consistently applied through a period of nearly five years, *Congress, in the 1924 Act—the statute which rules this case—re-enacted provisions of the 1921 Act which were practically word for word the same as subdivision (6) of the regulation issued under it.* Such re-enactment in the light of the administrative interpretation gives the interpretation the force of law (*Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach* v. *Helvering*, 293 U. S. 172). Thus, from the law and from the administrative interpretation of the law, it is clear that dissolution was not made or deemed an essential element of reorganization, where *all* the stock of a corporation is acquired, as is the case here.

Petitioner emphasizes the fact (Brief, pp. 11, 16) that Vanadium did not assume *all* the liabilities of Alloys and urges that this indicates that the transaction was not in the nature of a merger or consolidation. There is nothing in the statute making it an essential of reorganization that

the transferee assume all the liabilities of the corporation whose stock is transferred. The very fact that the statute expressly provides that there shall be a reorganization within the meaning of the statute if a *majority* of the shares of a corporation are transferred, leaves no doubt that the assumption of liabilities is not a requirement. Except in the most unusual circumstances, indeed, it is difficult to imagine *any* circumstances, in which the transferee of a mere majority of the stock of a corporation would assume all the liabilities of the corporation whose stock is transferred. Yet the statute expressly provides that such a transaction may be a reorganization under the statute. The words of Mr. Justice BREWER in *U. S.* v. *Goldenberg*, 168 U. S. 95, bear repetition here (pp. 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. * * * Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the

action of the collector, and hence there is no warrant for enforcing any such condition."

In his brief in this Court (pp. 11, 15-16) the petitioner makes the contention that the transaction is not within the statute because the interests of respondents in Vanadium, after the exchange, were not proportionately as great as their interests had been in Alloys, prior to the exchange. The statute imposes no such requirement, and what Congress has deliberately omitted the Court may not add (*Crooks* v. *Harrelson*, 282 U. S. 55, 61; *U. S.* v. *Goldenberg*, 168 U. S. 95, 102-103). That the omission was intentional appears from the statute itself. Thus in cases where the transaction involves a transfer of *assets* in return for a controlling interest in the transferee [Cases falling under Subd. (B) of Sec. 203 (h) (1)], as distinguished from a case like ours, where the transaction involves a transfer of *stock* [Cases falling under Subd. (A) of Sec. 203 (h) (1)], the statute expressly provides that the transaction shall not be a reorganization within the meaning of the statute unless two things concur: (1) that assets are transferred; and (2) immediately after the transfer the transferror shall be in control of the transferee. *Subdivision (A), which governs this case, contains no such requirement.* It requires only that a majority or more of the stock of one corporation be acquired by another corporation. It does *not* require that the stock received by the transferror, on the exchange, be the same proportion of the stock of the transferee as the transferror held in the corporation whose stock was transferred, or that the transferror acquire *any* particular fraction of the stock of the transferee. Indeed, the petitioner admits in its brief in the *Minnesota Tea Company* case (incorporated, by reference, in his brief in this case, p. 10 *) that subdivisions

* There is no similarity between the facts in these cases and the facts in the *Minnesota* case.

(A) and (B) have entirely different legislative histories and are mutually exclusive. He says further (*Minnesota Tea Co.* Brief, p. 31):-

> "We do not contend, as suggested by the Court below, [In the *Minnesota* case] that the requirement of clause B is to be incorporated in clause (A)."

Petitioner admits, also (*Minnesota Tea Co.* Brief, p. 19):

> "So far as the clause A transfers are concerned the statute specifies no definite measure of continuity."

Thus the answer to the contention that this transaction should not be deemed a reorganization under the statute because respondent's stock interest in Vanadium was not as great as it had been in Alloys is found in the statute itself. All that is required by the terms of the statute to constitute a transaction a reorganization is (1) that a majority, or more, of the stock of a corporation be transferred and (2) that the consideration received therefor by the transferror be stock or securities. The reason is plain enough and was fully recognized by Congress. In such a transaction no profit is "realized" and the imposition of a tax would "seriously interfere with those business readjustments which are peculiarly necessary under existing conditions" (Report of House Committee on Ways and Means, No. 350, 67th Congress, 1st Session, p. 10. See also Congressional Record, Vol. 61, Parts 6-7, 67th Congress, 1st Session, pp. 6549, 6550, 6562, 6565, 6568, 6569; Senate Conf. Rep. No. 486, 67th Congress, 1st Session, pp. 17, 18). What the substituted securities will ultimately bring, as compared with the cost of the surrendered securities, still remains to be seen. As Judge Learned Hand said in the *Gregory* case, 69 F. (2) 809, 811, aff'd 293 U. S. 465:

> "Such transactions were not to be considered as 'realizing' any profit, because the collective interests still remained in solution."

Similarly, Circuit Judge SOPER said in the *Mead* case [72 Fed. (2) 22, 28]:

> "It will thus be seen that the general purpose of all of these reorganization provisions was the same, not merely to remove the impediment to corporate readjustments, but also to prevent the recognition of purely fictitious gains or losses in the administration of the income tax law."

Such transactions result in no actual realization of gain or of loss, and, to prevent the tax from being a bar to business adjustments which are deemed essential in industry, Congress has, for a period of many years, provided that they shall not be held to yield either gain for tax or loss for deduction, until the later day when their fruits are otherwise disposed of, and this has been the consistent departmental practice. For the petitioner now to be permitted to reverse this policy would be to contravene the statute and the established departmental practice, and, in addition, place a tax "on purely fictitious gains", *i. e.*, upon interests which "still remained in solution".

The petitioner further contends:

(1) That the decision herein is in conflict with *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462; *Prairie Oil & Gas Co.* v. *Motter*, 66 Fed. (2) 309; *Von Weise* v. *Commissioner*, 69 Fed. (2) 439, certiorari denied, 292 U. S. 655; *Nelson* v. *Commissioner*, 75 Fed. (2) 696; and *G. & K. Mfg. Co.* v. *Commissioner*, 76 Fed. (2) 454;

(2) That the Treasury regulation referred to in the opinion below conflicts with the statute or with the construction placed upon the statute by this Court in the *Pinellas* case;

(3) That, insofar as the Court below has treated the bonds received by respondents as "securities", its decision

is inconsistent with its own prior decision in *Worcester Salt Company* v. *Commissioner*, 75 Fed. (2) 251; and

(4) That the transaction was not a reorganization because Alloys was not a party to the contract.

(1)

The decision below is not inconsistent with the decision of this Court in the *Pinellas* case; on the contrary, it follows that decision insofar as the case applies, *i. e.*, that the words within the parentheses in Section 203 (h) (1) expand the meaning of "merger or consolidation". On the facts, however, the *Pinellas* case is entirely different from this one. The transaction there was a *sale* for *cash and promissory notes.* This, as the Court pointed out (287 U. S. at p. 470), was not an "exchange" for cash and "securities", as permitted by the statute. In our case, there was an exchange, and not a sale, and the consideration received was "stock or securities", *i. e.*, stock of Vanadium and bonds of Alloys, secured by a trust mortgage.

The *Prairie Oil and Gas Company* case [66 F. (2) 309] involved the purchase of stock for cash: it was clearly outside the statute.

The *Von Weise* case [69 F. (2) 439] involved less than a majority of each class of stock: *no part of 10,000 shares* of preferred stock outstanding was acquired (see p. 440). The transaction was, accordingly, not within the terms of the statute.

The *Nelson* case [75 F. (2) 696] turned on the nature of the transaction. The Court emphasized particularly that the transferror received $2,000,000 *in cash* and 12,500 shares of *non-voting* stock of a newly organized corporation,

whereas the *other* party to the transaction held the entire 30,000 shares of *voting* stock, with the result (p. 698):

> "that the control of the property conveyed passed to a stranger, *in the management of which petitioner retained no voice.*"

In our case, respondents received 32,103 shares of the voting stock of the transferee and, in addition, by the terms of the agreement (R. 64), the respondent Sloane, the Trustee for all the respondents, became a director and a member of the Executive Committee of the transferee.

The *G. & K.* case [76 Fed. (2) 454] was a case of transfer of *assets*. It was not a transfer of *stock*, as is our case, in which it is undisputed that the element of resultant control is not involved (Petitioner's Brief in *Minnesota Tea Co.* case, p. 31). The corporation whose assets were transferred not only retained its identity and existence, but, by the very terms of the agreement, provision was made for its continued competition with the transferee in all except eight specified states. Many important assets of the transferror corporation were excepted from the conveyance and the Court found (p. 456):

> "Hence the taxpayer did not show with certainty that all, or even substantially all, of its assets were transferred; and, even if such a transfer did take place, the taxpayer remained in existence, possessed of a substantial amount of money, qualified to engage in active business in its own capacity or through its subsidiaries, and with the intent so to do, so far as the record shows."

There is no such situation here. Vanadium acquired *all* the stock of Alloys and Alloys continued to exist only as the wholly owned and controlled subsidiary of Vanadium.

**(2)**

The Treasury regulation to which the Court below referred is not, as petitioner contends, inconsistent with the decision of this Court in the *Pinellas* case. This Court held in the *Pinellas* case that the words within the parenthesis expand the meaning of the words "merger or consolidation" in Subdivision A of Section 203 (h) (1). The Treasury regulation gives examples of cases which would fall within such expanded meaning. This Treasury regulation (Regulation 62, Article 1566 b) includes:

> "(3) The sale of the stock of B to A, or * * * (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B * * *."

Nothing said in the *Pinellas* case is in any respect inconsistent with that regulation. Moreover, the re-enactment by Congress of the definition of "reorganization" contained in the statute, after it had been so interpreted by these regulations, gives the interpretation the force of a law (*Old Mission Portland Cement Company* v. *Helvering*, 293 U. S. 289; *Brewster* v. *Gage*, 280 U. S. 327). It is, of course, true that this Court is not bound by "contemporaneous interpretations" of the statute by administrative officers (Appellants' Brief in *Minnesota Tea Co.* case, p. 29): that, however, does not alter the fact that interpretations which have been approved and adopted by Congress, by re-enacting statutes *after* their interpretation, have the force of law and, if constitutional, are as binding on the Court as any other valid statute (see cases cited *supra*).

**(3)**

The last contention urged by petitioner (Brief, pp. 19-22) is that the decision of the Court below that the bonds received by respondents were "securities" is inconsistent with its own decision in the *Worcester* case [75 F. (2) 251]. The contention is without merit. In the *Worcester* case the petitioner, the Worcester Salt Co., on June 1, 1928, purchased the entire capital stock of the Kerr Co. Thereafter the Kerr Co. transferred all its assets, said to be worth $1,274,434.02, to the Worcester Salt Co. in exchange for bonds of the Worcester Salt Co. in the face amount of $680,000. In December, 1928, the Kerr Co. sold $300,000 of those bonds at par. The petitioner claimed a deductible loss in 1928 on the theory that its subsidiary, the Kerr Co., had received less on the sale of these bonds than the value of the assets which it had transferred in return for them. The case did not involve the meaning of "securities". That the Court regarded the bonds received as "securities" appears clearly from the following language in the opinion (p. 252):

> "The original basis of the bonds in the hands of the purchaser does not attach to the assets transferred in exchange, for Section 113 (*a*) (6), 26 U. S. C. A. Sec. 2113 (*a*) (6) states: 'This paragraph shall not apply to property acquired by a corporation by the issuance of its *stock or securities* as the consideration in whole or in part for the transfer of the property to it.' "

Inasmuch as no *stock* was issued in that case, the reference to "stock or securities" would have been meaningless unless the Court regarded the *bonds* which were issued as "securities".

Petitioner says in his brief (p. 20): "We appreciate that corporate bonds are commonly regarded as securities", but adds: "under statutes designed for different purposes".

The dictionaries, lay and law, define "securities" as including bonds secured by mortgage (see Webster's New International Dictionary, Abbott's Law Dictionary, Black's Law Dictionary). Mortgage bonds were held to be, or were recognized as, "securities" in *First National Bank* v. *U. S.*, 283 U. S. 142; *Burnet* v. *Brooks*, 288 U. S. 378; *Rosenthal* v. *Brown*, 247 N. Y. 479, and in other cases too numerous to mention. Bonds are so universally referred to, and treated as, "securities" that there would seem to be no justification for attributing to Congress an intention to *exclude* bonds when using the word "securities" in *this* statute, although it *included* bonds when using the same word in numerous *other* statutes.

**(4)**

The petitioner contends (Brief, pp. 11, 12-13) that the reorganization statute does not apply because Alloys, the corporation whose stock was transferred, was not a party to the contract, whereas Section 203 (b) (2) refers to transactions in which the stock or securities transferred are stock or securities in a corporation, a party to a reorganization. The answer to this contention is found in Subdivision (h) (2) of the same section, which provides:

> "The term 'a party to a reorganization' • • • includes *both corporations* in the case of an acquisition by one corporation of at least a majority of the total of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Thus, by definition, Alloys was a "party to (the) reorganization", inasmuch as this transaction was one in which more than a majority, *i. e.*, all, of the voting stock of Alloys, was acquired by Vanadium. This provision of the statute would be unnecessary and meaningless if it did not apply to cases where the corporation was not a signatory to the plan.

The statement in petitioner's brief (pp. 11, 12) that there was no "reorganization plan" overlooks the contracts between the parties (R. 55-67). While it is true that this contract was not entitled "Plan of Reorganization", it constituted the plan and was just as real a plan of reorganization as if it had been so labeled. As the Court below said (R. 93): "The plan of reorganization was the contract made and performed."

Several of the contentions now made by petitioner are raised for the first time since the decision on the appeal in the Court below. These are (1) that bonds are not "securities" under the Act; (2) that the Treasury Regulation which expressly defined such a transaction as this as a reorganization was contrary to the terms of the statute, or, at least, to the judicial interpretation of the terms of the statute; and (3) that the statute does not apply to this transaction because Alloys was not nominally a party to the plan of reorganization. We have discussed these contentions on their merits, but in doing so we do not waive the point that petitioner is not entitled to raise them here because they were not raised below. (*West* v. *Rutledge*, 244 U. S. 90; *Ana Maria Sugar Co. Inc.* v. *Quinones*, 254 U. S. 245; *Board of Supervisors* v. *Lackawanna Iron & Coal Co.*, 93 U. S. 619; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 229.)

## Conclusion.

The transaction here involved is a reorganization within the express terms of the statute and also under the Treasury Regulations promulgated pursuant to the statute.

There being no dispute that it was consummated solely for the purpose of carrying out legitimate corporate purposes, it constituted a reorganization under the statute. This, of course, does not mean that any profits realized from the transaction will escape tax. It means only that, as provided in the statute, any gain will be reported, and tax thereon paid, when the fruits of the transaction are sold or otherwise disposed of.

***The decision of the Circuit Court of Appeals should be affirmed.***

Dated, New York, N. Y., November 15, 1935.

Respectfully submitted,

JOHN F. MCCABE,
JAMES P. QUIGLEY,
ROBERT J. HEBERLE,
*Counsel for Respondents.*

SAMUEL SEABURY,
*Of Counsel.*

## APPENDIX.

### Statute and Regulations Involved.

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Revenue Act of 1918, Section 202 (b):

> "* * * but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange. * * *"

Regulations 45, Article 1567:

> "In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered."*

Revenue Act of 1921, Section 202 (c) (2):

> "* * * The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total num-

---

* This article was soon amended by a Treasury Decision, adding provisions pertinent to these cases (see *infra*, pp. 29-30).

ber of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), * * * "

Regulations 62, Article 1566 (b):

" * * * Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 202. (d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

* * * * * * * * * * *

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes,

choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

• • • • • • • • • • •

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

• • • • • • • • • • •

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its

assets to another corporation if immediately after the transfer the transferror or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 65, relating to the Revenue Act of 1924:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization. If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consoli-

dation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B. Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B and corporation A distributes as a dividend to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such dividends. (See art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and the determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See arts. 1596-1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ignored and both are treated thereafter as if the reorganization had not occurred.

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.) In such cases the gain to the shareholder is recognized and taxed, but in an amount not exceeding the amount of the money or the other property received in connection with the reorganization. If the money so distributed in connection with the reorganization has the effect of the distribution of a taxable dividend, such gain is taxed not as a capital gain but as an ordinary dividend subject to the surtax rates. While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

Revenue Act of 1928:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(6) Tax-Free Exchanges Generally.—If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and in-

creased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange, under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it;

Treasury Regulations 45, Article 1567, amended by T. D. 2924, issued in December 1919 (see Cumulative Bulletin 1, page 44):

21-19-522.
T. D. 2924.

SECTION 202, Article 1567: Exchange of stock for other stock of no greater par value.

Revenue Act of 1918.—Modification of articles 1566 and 1567 of Regulations 45.

2. Article 1567 of Regulations 45, as amended by Treasury Decision 2870, is amended to read as follows:

Art. 1567. Exchange of stock for other stock of no greater par value.—In general where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations,

no taxable income is received from the transaction by A or B or stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. The term "reorganization," as used in section 202 of the statute, includes cases of corporate readjustment where stockholders exchange their stock for the stock of a holding corporation, provided the holding corporation and the original corporation, in which it holds stock, are so closely related that the two corporations are affiliated as defined in section 240 (b) of the statute and article 633, and are thus required to file consolidated returns. So-called "no-par-value stock" issued under a statute or statutes which require the corporation to fix in a certificate or on its books of account or otherwise an amount of capital or an amount of stock issued which may not be impaired by the distribution of dividends, will for the purposes of this section be deemed to have a par value representing an aliquot part of such amount, proper account being taken of any preferred stock issued with a preference as to principal. In the case (if any) in which no such amount of capital or issued stock is so required, "no-par-value stock" received in exchange will be regarded for purposes of this section as having, in fact, no par or face value, and consequently as having "no greater aggregate par or face value" than the stock or securities exchanged therefor.

Revenue Act of 1918, Section 240 * * * (b):

"(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees

substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Treasury Regulation 45 (1918), Article 633:

"Art. 633. *When corporations are affiliated.*—Corporations will be deemed to be affiliated (a) when one domestic corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (b) when substantially all the stock of two or more domestic corporations is owned or controlled by the same interests. * * *."

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CHARLES ELMORE

Nos. 184-5-6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

*v.*

JOHN J. WATTS.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

*v.*

HUGH C. SICARD.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

*v.*

PARKER SLOANE.

## BRIEF AMICUS CURIAE

EDWARD H. GREEN,
*Amicus Curiae.*

SULLIVAN & CROMWELL,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935.

| | |
|---|---|
| GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. JOHN J. WATTS. | No. 184 |
| GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. HUGH C. SICARD. | No. 185 |
| GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. PARKER SLOANE. | No. 186 |

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

*May It Please The Court:*

EDWARD H. GREEN, as attorney at law for WESTERN POWER CORPORATION, asking leave to file a brief herein as *amicus curiae,* respectfully shows the Court:

When this cause was argued in the lower Court, the Circuit Court of Appeals for the second Circuit permitted deponent to file a brief in that Court as *amicus curiae.*

Both the Solicitor General, on behalf of the petitioner, and counsel for the respondents have stated to deponent that they have no objection to his filing a brief *amicus curiae,* and have authorized deponent so to advise this Court.

Deponent is the attorney for Western Power Corporation, which now has pending undetermined in the Board of Tax Appeals a case which involves the same question as is presented in the above entitled causes and in which the Government is claiming a deficiency in taxes running into millions of dollars. Accordingly, Western Power Corporation has a vital interest in the presentation and decision of these causes.

WHEREFORE, deponent moves the Court for leave to file, as *amicus curiae,* the brief hereto annexed.

EDWARD H. GREEN,
Attorney for Western
Power Corporation.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

EDWARD H. GREEN being duly sworn deposes and says that the facts and matters stated in the foregoing motion are true and correct.

EDWARD H. GREEN

Subscribed and sworn to before me,
this 12th day of November, 1935.

JOHN W. P. SLOBADIN
Notary Public,
New York County, New York.

## BRIEF AMICUS CURIAE

### Statement and Question

The relevant facts in the case were fully summarized by the Court below in one sentence:

> "The controlling facts may be stated in one sentence. The petitioners (respondents in this Court) exchanged all of the stock of Alloys solely for stock in Vanadium and bonds of Alloys."

The issue is whether or not this constituted a non-taxable reorganization under the provisions of Section 203(h) of the Revenue Act of 1924. This does not mean an exemption from taxation, but a postponement of the determination of taxable profit or deductible loss until a subsequent disposition of the securities received in the transaction. The Circuit Court of Appeals for the Second Circuit (reversing a divided Board) unanimously held it to be a non-taxable reorganization, and denied a rehearing.

The Board decided against reorganization because Alloys (the company whose stock was acquired by Vanadium) was not dissolved, and this the Circuit Court of Appeals held to be error. The question is thus sharply presented whether dissolution is necessary to constitute a non-taxable reorganization where one corporation acquires all the stock of another corporation in consideration of the issuance of its common stock. There is absent from the case any problem that might have arisen where the consideration given consisted only of short-term notes or bonds or nonvoting preferred stock or of any other type of obligation or security other than common stock.*

---

*The fact that bonds were given in addition to common stock would not deprive the whole transaction of its nontaxable character, for at worst it would merely constitute "other consideration" taxable under Subdivision (d) of Section 203. See footnote on page 16, *infra*.

## Summary of Argument

Shortly after the enactment of the Revenue Act of 1921, the Treasury Department promulgated Regulations thereunder in which the reorganization section was expressly interpreted so as to provide that the transaction now before the Court constituted a nontaxable reorganization.

Thereafter, Congress reenacted Revenue Acts four times (in 1924, 1926, 1928 and 1932), and in each of them reenacted the pertinent reorganization provisions of the 1921 Act without substantial change.

Furthermore, after each reenactment of the statute the Treasury Department promulgated its Regulations without material change on this question.

The suggestion that this transaction was a taxable reorganization was raised for the first time in 1933, after twelve years of consistent construction and application to the contrary and during which period there were four reenactments of the statute by Congress.

In addition, as we shall point out, there is direct proof that Congress in 1924 examined the administrative construction of the 1921 Act and meant to approve it in adopting the 1924 Act. Also the Revenue Act of 1934 was enacted after this controversy arose, and Congress still made no change in the provisions relevant to the question of dissolution here at issue.

Therefore, there is here presented a perfect case for the application of the rule that reenactment by Congress without material change gives the Treasury Regulation the force of law. In substantiation, there follows, with the requisite detail, the legislative and administrative history of the pertinent provisions of the Revenue Acts.

However, the Commissioner also urges now that his Regulations must be disregarded because they conflict with the statute. A mere reading of the wording of the statute is sufficient to negative this contention, but a study of the legislative history of the statute will make clear beyond question that the Commissioner's Regulations on the point here at issue are correct and exactly in accordance with the intentions of Congress.

**History of the Reorganization Section and the Regulations Construing It.**

THE 1918 ACT

In the Revenue Act of 1918 Congress took up for the first time the problem of reorganizations.[1] This Act provided (Section 202(b)):

> "but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, * * *."

Provision was made for treating as gain the amount of the excess in par or face value of securities received. No attempt was made to define "reorganization", "merger" or "consoljdation".

The Treasury Department thereupon promulgated under this Act Regulations 45. In these Regulations the above section was interpreted in Article 1567 as follows:

---

[1]The pertinent provisions of the Revenue Act of 1918 and subsequent Acts, and of the Regulations promulgated thereunder, are quoted in Appendix A.

"In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. If the stock so received has no nominal or par value the limitation on aggregate par value is inapplicable." (Underscoring ours.)

The transaction now before the Court would come under (c) in the above Regulation. It will be noted that in that case, and in cases (a) and (b), the Treasury Department ruled that a dissolution was necessary.

Thus, the Treasury Department clearly interpreted the 1918 Revenue Act as requiring a dissolution unless there was a statutory merger or consolidation. The statute had not defined the words, and the Treasury Department gave them the foregoing definition.

In the 1920 revised edition of Regulations 45 there was inserted in Article 1567 a provision to the effect that reorganization included a case where stockholders exchanged their stock for stock of a holding corporation, provided that the two corporations were affiliated so as to be required to file consolidated returns, and no mention was made of dissolution. Thus, even under the 1918 Act the Treasury

recognized that there were transactions that should be treated as nontaxable reorganizations, even if one of the corporations was not dissolved.

Obviously, the situation was unsatisfactory and uncertain, and cried aloud for Congressional action.

## The 1921 Act

Congress in 1921 took up this problem. In the 1921 Act it is provided in Section 202(c) (2) that no gain or loss shall be recognized,

> "(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word 'reorganization', as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected); or * * *." (Underscoring ours.)

The Committee on Ways and Means in reporting the Bill to Congress stated with respect to the profit and loss provisions of the 1918 Act:

> "Probably no part of the present income-tax law has been productive of so much uncertainty and litigation or has more seriously interfered with those business readjustments which are peculiarly necessary under existing conditions."

And referred to the proposed changes thus:

> "The preceding amendments, if adopted, will, by removing a source of grave uncertainty, not only permit business to go forward with the readjustments required by existing conditions but will also considerably increase the revenue by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges." (H. Rep. No. 350, 67th Cong., 1st Sess., p. 10.)

In the Report of the Senate Committee on Finance, this proposed Section 202(c) was discussed, and it was pointed out that the changes would remove "a source of grave uncertainty", and eliminate "many technical constructions which are economically unsound", and "permit business to go forward with the readjustments required by existing conditions" (S. Rep. No. 275, 67th Cong., 1st Sess., p. 11).

However, it is most important to note one of the differences that arose between the House and the Senate, and what came of it. Out of the settlement of this difference arose the provisions in the Act that are the basis of this controversy. The Senate Committee on Finance first proposed the provision that a reorganization should include the acquisition of "substantially all the stock * * * of another corporation". When the bill reached the floor of the Senate, Senator McCumber moved an amendment to reduce this requirement to a majority of the voting stock and a majority of all other classes. After a sharp debate on the floor of the Senate, the McCumber amendment was adopted.

Pertinent extracts from the debate are quoted in Appendix B to this brief. Some Senators pointed out that this provision would permit the building up of holding companies through nontaxable reorganizations, since one company could acquire a mere majority interest in other corporations, and thus control them. Other Senators argued that that

result was fair and proper, and should be permitted. The majority voted for the McCumber amendment.

The bill then went to conference, and the House accepted this Senate amendment. The report of the Conference Committee states:

> "The Senate amendment adds to this definition the case where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation; and the House recedes" (Conf. Rep. No. 486, 67th Cong., 1st Sess., pp. 17 and 18).*

It is thus clear that Congress in the interests of the public welfare, had found it necessary to broaden the reorganization provisions of the 1918 Act and to drop the restriction as to equal par value. It is also clear that the very clause in which we are interested, namely, the acquisition by one corporation of the stock of another, was the subject of considerable debate, and that it went through various changes before it finally reached its enacted form. The requirement that all the stock be acquired was deemed to be too onerous, and Congress ultimately adopted the majority standard—which is not sufficient to bring about dissolution or statutory consolidation or merger under general statutory provisions.

## The Regulations under the 1921 Act.

The Treasury Department thereupon promulgated under this new law its Regulations 62 (appr ved by the Sec-

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* It is noteworthy that the Conference Report uses the words "adds to this definition," and makes no mention of the use of a parenthetical clause from which the Treasury Department would now draw so many inferences.

retary of the Treasury on February 15, 1922). These Regulations, in referring to the reorganization section, provide in Article 1566(b) as follows:

> "Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization." (Underscoring ours.)

This Regulation follows closely in form the Regulation under the 1918 Act, and its similarities and differences are apparent and vital. Case (c) has now become case (3). Please note that all reference to dissolution has been omitted. This is likewise true of case (2), formerly case (b). The requirement of dissolution has only been retained in case (1), formerly case (a). In the Regulations under the 1918 Act, dissolution was a requirement in every situation, apart from consolidations or mergers. In the Regulations under the 1921 Act, dissolution is retained only in case (1), where it serves merely to distinguish case (1) from case (2).

The sentence added by the revised edition of the Regulations under the 1918 Act doing away with the provision for dissolution where the corporations were affiliated, dis-

appeared, as it was no longer necessary. Dissolution had ceased to be a requirement where the reorganization took the form of one corporation acquiring stock in another.

The case at bar clearly comes under cases (3) or (6). We have either "the sale of the stock of B to A" or "the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B", and "the sole consideration received by the stockholder is stock or securities of corporations A or B". All of the stock of B (Ferro Alloys Corporation) was acquired by A (Vanadium Corporation), and the sole consideration was the stock of A (Vanadium Corporation) and the bonds of B (Ferro Alloys Corporation).

In the clearest possible language the regulation states that in those situations

> "no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B".

The principal change in the Regulations from the 1918 Act to the 1921 Act was the omission of the requirement of dissolution. That it should have been omitted would seem almost indisputable. The 1921 Act made no reference to that requirement, despite the suggestion contained in the Regulations under the 1918 Act; but further, the 1921 Act in effect excluded the possibility of such a requirement, in view of the action of Congress, after consideration and amendment, in finally including as a reorganization the acquisition of a mere majority of the stock. Not only does the acquisition of a majority of stock not constitute a dissolution, but it is insufficient to bring about a dissolution under general corporation laws, where the requirement is usually two-thirds.

## The 1924 Act

In 1924 Congress again took up the revision of the Revenue Act. In the 1921 Act the provisions dealing with the transactions from which no gain or loss should be recognized, appeared as Subdivision (c) of Section 202. In the Revenue Act of 1924, these provisions were taken out of that section and given a section of their own, to wit, Section 203.

Before taking up this new section, the following situation must be noted, which will explain what the Court below referred to when it said:

> "The fact that it (Congress) changed a related part of the statute to remove any doubt as to the validity of a Regulation and at the same time re-enacted the part which had been construed by the Regulation which governs here, shows an adoption of such construction."

In the 1921 Act provision was made that in the case of a reorganization no profit or loss should be recognized to *stockholders* from a reorganization; but nothing was said as to whether any gain or loss would result from such reorganization to the *corporations* themselves. However, it will be noted that in the above quoted Article 1566 of Regulations 62, interpreting the 1921 Act, the Treasury Department stated that no gain or loss should be recognized in the case of the corporations as well as in the case of the stockholders.

This was examined by Congress, the Committees of both Houses commented upon it, and then Congress extended the statute to make it as broad as the Treasury Department's Regulations.

The Report of the Committee on Ways and Means is illuminating. It calls attention to the amendment it is proposing in the law to provide that there shall be no recognition of gain or loss to the corporation in a reorganization, and then proceeds:

> "There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The statute should contain a definite rule on this question.
>
> Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation." (H. Rep. No. 179, 68th Cong., 1st Sess., p. 13.)

The Report of the Senate Committee on Finance, similarly referring to this section, said:

> "There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department on this question is of doubtful legality and a statutory provision is most necessary."

And it thereupon also recommended the extension of the exemption from gain or loss. (S. Rep. No. 398, 68th Cong., 1st Sess., pp. 14 and 15.)

Therefore, we have this situation: Congress examined into the interpretation placed by the Treasury Department's

Regulations on the reorganization section of the 1921 Act. It found that in one respect those Regulations went beyond what the act provided, namely, in extending nonrecognition also to the corporation. Thereupon it re-enacted the reorganization section in substantially the same language, and added a new subsection, numbered (3), to broaden the statute to accord with the Regulations.

It should be noted that the only substantial change that Congress made in the definition of reorganization was to enlarge it. It had already included (1) the acquisition of a majority of stock, and (2) the acquisition of substantially all of the assets; and it now introduces a further category, namely, the transfer by a corporation of only part of its assets in exchange for securities, if it or its stockholders control the transferee.

In 1924 Congress thus reviewed its earlier statute after a lapse of three years. It had before it the interpretation of the Treasury Department set forth in the Regulations dealing with the much-mooted reorganization section. This Regulation had dropped the requirement for dissolution that had been contained in the preceding Regulation. Congress found that this Regulation went further than the statute in the one respect above noted. It thereupon extended the statute to cover this point in the Regulations. Its further action was to broaden even further the definition of the word "reorganization" by adding another class of transaction.

Here we do not have to rely upon a presumption that when Congress reenacts a statute that has received executive construction, it approves such construction and thereby adopts it. We go even beyond that view, for Congress certainly in 1924 examined and then affirmatively approved the Treasury Department's interpretation of the reorganization section of the 1921 Act. When it reenacted the words

of the statute, without substantial change, and added a provision to bring the statute into accord with the Regulations on the point where it found that the Regulations had gone beyond the statute, *it assuredly evidenced its acceptance of the balance of the Regulations as being in accord with the statute.*

After the adoption of the 1924 Act, the Treasury Department promulgated its Regulations thereunder known as Regulations 65. Article 1574 deals with reorganizations, and is substantially the same as the Regulations under the 1921 Act except that it has now been expanded to include the transfer by one corporation of all or part of its assets to another corporation, with retention of control.

## The 1926 Act

Two years later Congress again took up the revision of the Revenue Law, and although it was amended in certain respects, the reorganization definition was again reenacted, without substantial change. (See Section 203 (h) (1) of the Revenue Act of 1926.)

The Treasury Department promulgated its Regulations thereunder, being Regulations 69, and again adopted this interpretation of the reorganization definition, without substantial change. (See Article 1574 of Regulations 69.)

## The 1928 Act

In 1928 Congress made a rather extensive revision and readjustment in the Revenue Law. The reorganization definition now appears in Section 112, but the old language was reenacted, without substantial change. (See Subdivision (i) of Section 112 of the Revenue Act of 1928.)

The Treasury Department promulgated Regulations 74 under this Act. The definition of reorganizations is cov-

ered in Article 574, and, although the wording is somewhat changed and the section is a little more elaborate, still it is the same in substance in omitting the requirements of dissolution. For the first time a change does appear, but it does not affect the fundamental principle involved. The Regulations now provide that the stockholders of X who transfer their stock to Y shall receive only stock or securities of Y. This change would, at most, bring into question the taxability of the bonds of the Ferro Alloys Corporation received by the stockholders, and would not affect the balance of the transaction, as is pointed out by Article 575 of the Regulations[1]. It must also be noted that this change did not take place until four years after the transaction now before this Court. But even though the Treasury Department made this change in 1928, it still continued its interpretation that did not require dissolution.

## The 1932 Act

Four years later Congress again took up the Revenue Act and made certain changes in it, but reenacted the definition of "reorganization" without change. (See Subdivision (i) of Section 112 of the Revenue Act of 1932.)

The Treasury Department promulgated thereunder its Regulations 77. Article 574, which deals with reorganizations, is substantially the same as the corresponding article in the preceding Regulations.

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[1] It would seem that Ferro Alloys was a "party to the reorganization", as that term is defined in Section 203(h)(2) of the Revenue Act of 1924, so that its bonds would be the securities "in such corporation or in another corporation a party to the reorganization" within the meaning of Section 203(b)(2) of the Revenue Act of 1924. The Court below must have so concluded, because it denied a motion for reargument, based on the claim that its decision in this case was inconsistent with its decision in *Worcester Salt Co.* v. *Com.*, 75 F. (2d) 251.

The first intimation that dissolution was necessary for a nontaxable reorganization came in June 1933, in the decision of the Board of Tax Appeals in *Minnesota Tea Company* v. *Commissioner,* 28 B. T. A. 591. It would appear from the record that the point was raised by the Board *sua sponte.*

No reference was made to the legislative and administrative history of the Act. The decision of the Board was reversed by the Circuit Court of Appeals for the Eighth Circuit (76 Fed. (2d) 797), and the case is now pending in this Court on *certiorari* (Docket No. 174). The Board's decision in the cases at bar followed shortly after its decision in the *Minnesota Tea Co.* case.

## The 1934 Act

When Congress took up the revision of the Revenue Act in the spring of 1934, the decisions of the Board of Tax Appeals in the *Minnesota Tea Company* case, in the case at bar and in other cases had sharply raised the question of dissolution as a requirement for reorganization. Also, various other occurrences had sharply focused attention upon the reorganization sections of the Revenue Act.

Despite this, Congress, although it made certain significant changes in the reorganization section, still refrained from requiring dissolution in its definition of "reorganization". Also, it still included therein, the acquisition by one corporation of less than all of the stock of another corporation. Thus, it not only failed to mention dissolution, although the question had been squarely raised, but it also continued to include in the definition of "reorganization" a stock acquisition which did not necessitate, or even involve, dissolution. *It even dropped the use of the parenthetical clause,* which action directly confirms the Treasury Department's continuous past construction and opposes its present position.

**The repeated reenactment by Congress of a Statute, after a continuous administrative construction, is the adoption by Congress of that construction, giving it the force of law.**

Our situation is that Congress adopted the reorganization section in 1921. The Treasury Department promulgated its construction, which did not require dissolution in a case such as that now before the Court, thereby changing the Regulations that had existed under the 1918 Act. Congress four times thereafter, running over a period of eleven years, enacted revenue laws and kept this definition substantially unchanged; and the Treasury Department has, during all these years, promulgated its Regulations that have consistently maintained the same interpretation announced in 1921, namely, that dissolution is not necessary. Even in 1934, Congress in its fifth reconsideration of the definition of "reorganization", still did not require dissolution in a case such as that now before the court.

As early as the case of *Edwards* v. *Darby*, 12 Wheat. 206, the Supreme Court began to establish its rule that great weight would be given to a consistent construction of a statute by department officials who are called upon by law to act under the statute and to carry it into effect. (See *National Lead Company* v. *U. S.*, 252 U. S. 140; *Logan* v. *Davis*, 233 U. S. 613).

This rule, stated and followed in innumerable cases, would in itself be sufficient to be determinative of the present case; but where in addition to consistent administrative construction *there is also reenactment by Congress*, this Court has laid down an even stronger rule.

*U. S.* v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. (Citing cases.) And we have decided that the reënactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."

*National Lead Company* v. *U. S.*, 252 U. S. 140, 146:

> "The reënacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute." (Citing cases.)

*U. S.* v. *G. Falk & Bro.*, 204 U. S. 143, 152:

> "This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 * * *."

*U. S. Dakota-Montana Oil Company*, 288 U. S. 459, 466, 467:

> "Thus the Acts of 1918, 1921 and 1924 were consistently construed by the regulations to permit a depletion, but not a depreciation, allowance for the

> costs of development work and drilling, which were treated for this purpose either as a part of the cost or an addition to the discovery value of the oil in the ground. The administrative construction must be deemed to have received legislative approval by the reënactment of the statutory provision without material change." (Citing cases.)

Numerous decisions of this Court to the same effect may be cited, but we pass to the 1934 Term for its most recent statements and applications of the principle:

In *Old Mission Portland Cement Company* v. *Helvering*, 293 U. S. 289 (December 3, 1934), Mr. Justice Stone phrased it thus:

> "These provisions were retained without substantial change in the regulations promulgated under the 1924, 1926 and 1928 Acts. As § 234(a) (1) to which they pertain has been reënacted in several Revenue Acts, the regulation now has the force of law."

In *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172 (November 5, 1934), Mr. Justice Cardozo explained the principle thus:

> "Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the Treasury and with the interpretation of its own meaning implicit in them (citing cases). From this administrative history the inference is compelling that a second return * * * does not toll a limitation which has once begun to run."

See also *Helvering* v. *Bliss*, 293 U. S. 144 (November 5, 1934), and *Helvering* v. *Union Pacific Railroad*, 293 U. S. 282 (December 3, 1934). In both these cases the

Treasury Department had by its regulations construed the statute, Congress had reënacted it, and then the Treasury Department sought to reverse its interpretation; and in both instances this attempt of the Treasury Department was unsuccessful.

Finally, and most recently, in *Hartley, Executor,* v. *Commissioner* (decided April 29, 1935), this Court held as follows:

> "The reënactment of the pertinent provisions of Section 202 of the Revenue Act of 1921 and the Acts of 1924 and 1926, without material change, was a Congressional recognition and approval of the interpretation of the section by the Treasury Regulations *which gave them the force of law.*" (Italics ours.)

As we stated at the outset, it would be almost impossible to find a clearer case for the application of this principle than the case at bar.

**The Treasury Department's Regulation was not inconsistent with the statute, but on the contrary was the proper interpretation of it.**

Clearly, under the Regulations, re-promulgated four times, the acquisition by Corporation A of the requisite amount of stock of Corporation B in exchange for common stock of Corporation A constitutes a nontaxable reorganization regardless of whether Corporation B is dissolved; but now the Commissioner asserts that this Regulation must be disregarded because it is not consistent with the statute.

The complete and obvious answer is that suggested by the Court below, namely, that if the construction was wrong, Congress had four opportunities to change it, and

failed to do so. This argument becomes irresistible when we recall the examination made by Congress in 1924 into the Treasury Department's Regulations dealing with reorganization.

Furthermore, this interpretation is squarely in accord with the language of the Act; and it similarly accords with the purpose, as becomes evident when we recall the changes made in this section before it reached its final form, the McCumber amendment on the floor of the Senate and the debate thereon (Appendix B). Congress said that "reorganization" should include the acquisition of a majority of the stock of a corporation; it did not add any requirement that there should be a dissolution, which it could readily have done in that Act or in any of the four subsequent reenactments of the statute, if Congress had so intended. Also, the ownership of a majority of the stock of a corporation is generally not sufficient to bring about dissolution (or consolidation or merger). Therefore, it would have been meaningless for Congress to have provided that the acquisition of a mere majority of a corporation's stock constituted a reorganization, if it meant that dissolution was a necessary concomitant, for a mere majority is generally insufficient to bring about dissolution.

Although there is no question of inconsistency in this case, it may be noted that this Court in *United States* v. *Alabama Great Southern Railroad Company*, 142 U. S. 615 (p. 621), while doubting whether the administrative construction was consistent with the wording of the statute, nevertheless upheld it where it had been consistently applied for nine years, even though there had been no statutory reenactment.

The Commissioner appears to rest his argument upon the language of this Court in *Pinellas Ice & Cold Storage*

*Co.* v. *Commissioner,* 287 U. S. 462, but the argument is based upon an obvious misconstruction of this Court's opinion.

This Court, although affirming the decision of the lower Court, took occasion to state that it disagreed with the narrow construction of the reorganization section announced by the lower Court, and that it preferred the views of the Circuit Court of Appeals for the Second Circuit in *Cortland Specialty Co.* v. *Commissioner,* 60 Fed. (2d) 937. It will be remembered that it was this latter Court that decided the cases now at bar, and in so doing it expressly purported to be acting in no way inconsistently with its decision in the *Cortland Specialty* case or the decision of this Court in the *Pinellas* case.

In the *Pinellas* case the consideration given for assets consisted of cash and some short-term notes. Such a transaction was held by this Court to partake of the nature of a sale rather than a reorganization; and we respectfully state our belief that the pith of this Court's opinion is to be found in the following language near its conclusion:

> "But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes."

The distinction is made between transactions partaking of the nature of a sale, as distinguished from reorganizations; and the criterion of this distinction is the nature of the consideration. Where the consideration is cash or its

substantial equivalent, then the transaction is really a sale even if the other statutory conditions are met. To make it a reorganization, the consideration received by the seller must give him a definite interest in the affairs of the purchasing company.

In the case at bar, common stock of the purchaser was given to the seller; and certainly the seller thereby acquired the most definite interest in the affairs of the purchasing company.

This explains the alleged diversity between the different decisions of the lower Courts upon which the Commissioner relied in seeking this writ of certiorari.

In *Prairie Oil & Gas Co.* v. *Motter*, 66 Fed. (2d) 309, the Court held that a sale for cash was not a reorganization.

In *John A. Nelson Co.* v. *Commissioner*, 75 Fed. (2d) 696, the consideration was cash and nonvoting preferred stock; and there the Court held there was no reorganization (Docket 61).

In *Worcester Salt Co.* v. *Commissioner*, 75 Fed. (2d) 251, the consideration was bonds, and that the Court held was insufficient to make it a reorganization.

However, in *Minnesota Tea Company* v. *Commissioner*, 76 Fed. (2d) 797, the consideration was common stock and cash, and the Court held that it was a nontaxable reorganization.

These cases are all distinguishable by applying the yardstick of what constitutes a sufficiently definite interest on the part of the seller in the affairs of the purchasing company. Obviously, common stock must be sufficient; and that is the case at bar and the *Minnesota Tea Company* case. The decision of what stock or securities other than

common stock are sufficient, will determine the correctness of the other cases.

The case of *G. & K. Manufacturing Co.* v. *Commissioner*, 76 Fed. (2d) 454 appears to have gone off on the question as to whether the taxpayer showed "with certainty that all or even substantially all of its assets were transferred", and therefore would not be in point (Docket 187).

The final case cited by the Commissioner, namely, *Von Weise* v. *Commissioner*, 69 Fed. (2d) 439, is obviously not in point, as it clearly does not come within the statute because the purchaser acquired the requisite amount of common stock but not a majority of the nonvoting preferred stock.

Accordingly, there is no substance in the Commissioners' claim of inconsistency between the Regulation and the statute; or of inconsistency between the Regulation and the decision of this Court in the *Pinellas* case; or of inconsistency between this case and the *Minnesota Tea Company* case, on the one hand, as against the other lower Court Federal cases cited by the Commissioner.

## Conclusion

It is respectfully submitted that the judgment below should be affirmed.

EDWARD H. GREEN,
*Attorney for Western Power Corporation, Amicus Curiae.*

SULLIVAN & CROMWELL
*Of Counsel.*

## APPENDIX A

### Revenue Act of 1918

LAW—SECTION 202(b)

"* * * but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange * * *."

REGULATIONS 45

Article 1567

"In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered."

(Added in the revised 1920 edition)

"The term 'reorganization,' as used in section 202 of the statute, includes cases of corporate readjustment where stockholders exchange their stock for the stock of a holding corporation, provided the holding corporation and the orig-

inal corporation, in which it holds stock, are so closely related that the two corporations are affiliated as defined in section 240 (b) of the statute and article 633, and are thus required to file consolidated returns."

**Revenue Act of 1921**

LAW—SECTION 202(c)

"The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), * * *."

REGULATIONS 62

Article 1566 (b)

"* * * Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

**Revenue Act of 1924**

LAW—SECTION 203 (h) (1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 65

Article 1574

"* * * If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B."

**Revenue Act of 1926**

LAW—SECTION 203(h)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 69

Article 1574

"* * * If two or more corporations reorganize, for example, by—'

(1) The dissolution of corporation B and the sale of its assets to corporation A,

(2) The sale of its property by B to A,

(3) The sale of the stock of B to A,

(4) The merger of B into A,

(5) The consolidation of A and B,

(6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or

(7) The transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B,

then no taxable income is received from the transaction by corporation A or B if the sole consideration for the

transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B."

**Revenue Act of 1928**

LAW—SECTION 112(i)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 74

Article 574

"* * * If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after

the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation."

**Revenue Act of 1932**

LAW—SECTION 112(i)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 77

Article 574

"* * * If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number

of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation."

**Revenue Act of 1934**

LAW—SECTION 112(g)(1)

"The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, * * *"

## APPENDIX B.

Excerpts from Congressional Record, Vol. 61, parts 6-7, 67th Congress, 1st Session—Debate on McCumber amendment to definition of reorganization in Revenue Bill.

[p. 6549] MR. MCCUMBER. Mr. President, after the language in lines 8 and 9 on page 12, proposed to be stricken out, in lieu of the matter proposed to be inserted by the committee amendment, on lines 9, 10, and 11, it is proposed to amend the amendment by inserting the following:

> merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation.

That is amendment numbered 2 on the print which has been circulated, and which are called, I think, by the euphonious name of "bloc amendments."

MR. JONES of New Mexico. May I ask the chairman of the committee to state why the change was suggested? There must be some specific reason for it, and not having had the advantage of knowing what the reason was I ask the Senator to state the purpose of making the change.

* * * * * * * * *

[p. 6550] MR. MCCUMBER * * *

Now, it so happens that in many instances, while you might have substantially or nearly all of the stock, years might pass before all of the stock of the absorbed corporation would be brought in, and yet the reorganization can take effect even though every share of the stock may not be accounted for. This is to protect the person who

receives the stock from being charged with a profit where he has not made a profit upon the stock which is received, even though there may be some outstanding stock.

* * * * * * * * *

[p. 6562] MR. JONES of New Mexico. I am sure the Senator [Mr. Penrose] does not think so now, but here is the effect of the amendment: Suppose that there were two individuals, each of whom owned a majority of the stock of separate corporations. Suppose, for instance, that there are two steel manufacturing concerns, and I own a majority of stock in one and the Senator to my right, the Senator from Rhode Island [Mr. Gerry], owns a majority of stock in another. We propose to consolidate the management of those two concerns. We have a right under this provision to organize a new corporation, and I put in my stock for any number of shares which I may see fit to have issued for them and a like number of shares are assigned, of course, to the Senator from Rhode Island, who owns a majority of the stock in another concern. It is a specific plan, adapted primarily to permit the consolidation of the control of corporations and putting water into their capitalization. If it means anything, that is just what it means. You can organize a holding company for the purpose of taking over a majority of the stock—not the property, as suggested by the Senator from North Dakota, simply because they can not get in a few outstanding shares of stock, because we all know that in order to transfer the property you have to get the consent of all the shareholders in the case of the ordinary corporation; so it is not for the purpose of transferring the property at all. It is simply for the purpose of transferring the control of the stock of the corporation, and it is intended primarily to permit that kind of thing to be done under this sanction of law, and that there shall be no gain or loss considered in the transaction.

If I am able to understand this amendment, that is just what it means. It means, as I say, that you organize a holding company and then every person who owns a majority of the stock of another concern can put into the new holding company simply his majority of that stock, and then the holding company issues stock in any amount in payment for the majority stock of these various subsidiary corporations. It simply means, as I said in the first place, a very convenient device for the purpose of pumping water into the capitalization of corporations, and that is the purpose for which it would be used.

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MR. WATSON of Indiana. I think the all-sufficient answer to that is simply this proposition: If the Senator owns $100,000 worth of stock in one corporation, and under the provisions of this amendment he transfers those shares of stock to another corporation and receives shares of stock of the new corporation to the value of $1,000,000, he will carry that $1,000,000 worth of stock at the value of the $100,000 worth of stock. He must carry it at that old value until he sells it, and when he sells it he accounts by way of taxation for the gain which he makes. That is all that this amendment provides. It is purely a paper affair. It is the exchange of the stock of different corporations for business purposes; and at a time when so much reorganization is going on in the business world, it is thought by all those interested in the upbuilding of the industries of the country at this time that this is a very helpful provision.

I call the Senator's attention to the further fact that it prevents the registration of losses quite as much as the registration of gains, and at this time, when many of these transfers are being made, losses will occur more frequently than gains. Therefore, on the whole, this seems

to be amply safeguarded, for if the Senator will read the language on page 13 in this very section, on the subject of gains and losses, he will see it is provided that—

> Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section—

That is, for the purposes of ascertaining either gain or loss—

> be treated as taking the place of the property exchanged therefor.

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[p. 6565] MR. JONES * * * while the amendment refers to what is called a reorganization, when we come to the definition of the word as stated in the bill itself we find it does not necessarily mean a reorganization, it does not necessarily mean a merger or a consolidation, but what it does mean is that persons controlling a majority of the stock may meet and organize a new concern which will own nothing but a majority of the stock, and in payment for that majority of the stock issue the stock of the new concern in any amount which they may choose.

MR. REED. Free from tax.

MR. JONES of New Mexico. Yes; free from tax. I will state the effect of it, and I can not illustrate it any better than in the organization of the United States Steel Corporation today. When that concern was organized it did not take over the property of the various other steel concerns. I think in most cases it took over practically all the stock, but under this arrangement it would not need to do that. It could simply take over a majority of the stock, control the stock, freeze out the minority stock-

holders, control the new aggregation and issue new stock in an unlimited amount in payment for the stocks of the subsidiary corporation, and pay no tax on it, although the next day the market value might be very much greater than the market value of the aggregate securities of the subsidiary corporations.

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MR. MCCUMBER. I think the Senator from New Mexico has made this proposition far more complex than it really is. Let us see if we can not simplify it by a concrete illustration which I think is pertinent.

We will say that one corporation owns 160 acres of land worth $100 an acre, or a total of $16,000. Another corporation owns 100 acres of land worth exactly the same amount per acre; that is, $100 an acre, or a total of $10,000. Another corporation owns 40 acres of land worth $100 an acre, or a total of $4,000. The interests of the three corporations amount in the aggregate to $30,000. Now, the corporations unite and put all of their stock into a new corporation, issuing $30,000 worth of stock to the owners of the land in the proportion of 16, 10, and 4. The Senator from New Mexico would not say that they had either gained or lost by that transaction; they would have exactly the same interest which they previously had and the Senator would not allow the Treasury Department to say to those stockholders, "You have made a gain even though you have not sold a single acre of the land."

Now, let us carry the illustration a step further and say that the stockholders of the corporation owning the 40 acres will not come into the consolidation, but the other two corporations purchase 51 per cent of the stock of the corporation which owns the 40 acres. Then they have fifty-one one-hundredths of the stock of the corporation owning the

40 acres; that is their interest in that 40 acres of land. All this amendment does is to apply the same rule to those who have purchased that stock, so that they shall not be held to have gained or lost by the issuance of the new stock, because the new stock, even though it represents only fifty-one one-hundredths of the 40 acres, nevertheless exactly measures what they have received, and there is no gain and no loss in the transaction.

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[p. 6568] MR. REED. * * * This bill proposes to make that sort of a transaction all the easier, and to say that the law, instead of applying, as it did originally, to an actual reorganization of the same corporation, in which event a man simply took down a different share of stock for his original share, and it shall now apply if a majority of the stock is carried into the consolidation.

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[p. 6569] So MR. MCCUMBER'S amendment to the amendment of the committee was agreed to.

# SUPREME COURT OF THE UNITED STATES.

Nos. 184, 185, 186.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
184 *vs.*
John J. Watts.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
185 *vs.*
Hugh C. Sicard.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
186 *vs.*
Parker Sloane.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 16, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

These causes involved deficiency assessments for income tax against the three respondents for the year 1924.

They were the sole stockholders of United States Ferro Alloys Corporation—herein Ferro Alloys—and the causes, alike in all essential particulars, were dealt with below in one opinion.

The respondents maintain that they exchanged all stock of Ferro Alloys for shares of Vanadium Corporation of America and bonds of Ferro Alloys guaranteed by Vanadium; that these two corporations were parties to a reorganization, and that under Sec. 203 (b) (2), Revenue Act, 1924, no taxable gain resulted. The Commissioner insists that the transaction was a sale of all the stock of the Ferro Alloys and therefore taxable gain resulted. The applicable statutory provision is Sec. 203, Revenue Act, 1924, the pertinent parts of which are in the margin of the opinion in No. 174, *ante*, p. 2.

In December, 1924, respondents owned all the stock of Ferro Alloys Corporation. They exchanged this with the Vanadium Corporation for stock of the latter valued at $30 per share and for

$1,161,184.50 mortgage bonds of Ferro Alloys guaranteed by Vanadium. Ferro Alloys continued to conduct business until its dissolution in 1928. Article 1574 of Treasury Regulations 65 provided that under the Act of 1924 no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization, if two or more corporations reorganize, for example, by either the sale of the stock of B to A, or the acquisition by A of a majority of the total number of shares of all other classes of stock of B.

The transaction here involved is within the description of reorganization recognized by the Treasury Regulation above quoted. And if the regulation can be taken as properly interpreting the statute, the challenged judgment must be affirmed.

The court below recites the history of the Treasury Regulation above quoted and concludes that, in view of the reenactment of the paragraph to which it refers without change, Congress intended to approve the regulation as written.

The Commissioner here maintains that the definition of reorganization found in Sec. 203 (h) (1) (A), Revenue Act, 1924, should be limited to transactions which partake of the nature of mergers or consolidations and that here the Vanadium merely made an investment in Ferro Alloys stock and obtained only the rights of a stockholder therein. It is also urged that an exchange of stocks for bonds results in a substantial change of position and that such bonds are "other property" within the meaning of the statute and as such subject to tax. Much of the argument presented is the same as the one considered in the *Minnesota Tea Company* case, and it need not be again followed in detail. The bonds, we think, were securities within the definition and cannot be regarded as cash, as were the short term notes referred to in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462.

The judgment of the court below must be

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*